



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 262 OF 2012

SAMMY BETT 1ST CLAIMANT
LEAH KIGET..... 2ND CLAIMANT
DANIEL NKANATA..... 3RD CLAIMANT
REUBEN KENDUIWA..... 4TH CLAIMANT
JOEL AMUGA..... 5TH CLAIMANT

VERSUS

NATIONAL CEREALS AND PRODUCE BOARD RESPONDENT

JUDGEMENT

1. The claimants' suit is based on unlawful/wrongful termination of their employment by the respondent. The suit was filed on 1st March 2012 by the five (5) claimants who were all employed by the respondent at the Silo depot in Narok. The respondent a government parastatal filed the defence on 26th August 2012 and denying the entire claims by the claimants and stated that there was a Recognition Agreement and a Collective Bargaining Agreement (CBA) between them and the Kenya Union of Commercial Food and Allied Workers (KUCFAW) effective from 1st July 2005 to June 2007 which covered the claimants. In evidence, all the claimants testified and the respondent called two witnesses Mr Zephaniah Chepkechir Chepcheng and George Abila. At the close of the hearing both parties filed their written submissions dated 2nd July 2014 and 8th July 2014 for the claimant and respondent respectively.

Claimant's case

2. The claimants were on divers dates employed by the respondent in various capacities and were all based at the Narok silos of the respondent depot. The claimants were members of KUCFAW with who the respondent had a Recognition Agreement and a CBA effective from 1st July 2005 to 30th June 2007. On **6th November 2007** the claimants were terminated from their employment through a letter dated **6th June 2008** on the grounds that there was a loss of 680 bags of wheat at the Narok silos depot. Mr Patrick Terer the respondent security officer reported the matter at Narok Police Station on 1st August 2007. A third party was also appointed by the respondent to conduct an audit review and filed a report dated 24th September 2007. Upon termination, the claimant lodged their appeals with the respondent and being dissatisfied with the outcome decision, the claimant referred the dispute to their union which in turn reported the same to the Minister and a Conciliator was appointed. There conciliator failed to reach a settlement and the claim was therefore filed in court. After the termination of the claimants, the

respondent made changes to the security company that were in operation at the time being Brinks Security Services and contracted Kenya Shield Security Services Limited together with Race Guards Limited.

3. The claimant's contention is that their termination was in violation of their rights and privileges and that the respondent has caused them grave harm, damages and loss and are seeking a declaration that this was unfair. The claim is for;

- (1) payment in lieu of notice,
- (2) payment of accrued leave and travelling allowance,
- (3) 12 months compensation,
- (4) damages,
- (5) service gratuity as per the CBA,
- (6) unpaid allowances, and
- (7) Certificates of Service.
- (8) Costs are also claimed.

4. In evidence, Sammy Bett the 1st claimant stated that he was employed as a Cashier of the respondent and in May 2007 he was appointed to act at the depot Manager who had gone on leave on 23rd April 2007. The acting was until 4th July 2007 when the manager came back. On the night of 31st July 2007, the Manager and security officers went to report theft of wheat at the Narok police Station by which time he had 3 days off to attend to his children going back to school. On 31st August 2007 he got a letter from the head office that wheat had disappeared during the period he was acting as manager of the depot. This was followed by an audit team that came to review the case and he was asked to hand over and proceed on compulsory leave. In September he was suspended and in June 2008 he was terminated. He lodged his appeal on 23rd June 2008 to which no reply has been given to date.

5. The witness also stated that he was unionised and thus reported the matter to KUCFAW who reported a dispute with the Minister. There was no settlement.

6. The witness was accused of negligence, that while he was acting as manager, wheat disappeared and this had not been brought to his attention until one month later after he had resumed from his leave. The report with the police was never pursued. The lost wheat was said to have been lost in June at a time when most staff were on leave and a period when the respondent would be engaged in annual stock taking. As the acting manager, he received around 16,000 bags of wheat for drying and storing and all the transactions were recorded and no wheat was lost. When he was handing over there were 2000 bag, 8000 were dispatched and the allegation that 860 bags of wheat were lost when he was acting was not correct as all wheat received at the depot was accounted for. Where any wheat was lost, it was not when he was acting as thee was proper handing over and the respondent has the records.

7. The witness also stated that upon termination he was called by the staff advisory committee (SAC) for a hearing on the loss of 860 bags of wheat. The hearing was on 6th March 2008. He accepted there were losses of wheat but denied responsibility and where there was such loss it was due to the criminal incident that was reported to the police and had occurred on the night of 31st July 2008. The matter was not thoroughly investigated and the respondent failed to follow the CBA on the procedure for suspension. SAC recommended that he should pay for the loss of wheat which he refused and was surcharged.

8. He was entitled to three (3) months' notice under the CBA or payment in lieu of such

notice which the respondent failed to do. He is seeking reinstatement. He was paid Kshs.281, 935.56 part of the provident fund.

9. The 2nd claimant, Lear Kiget gave evidence that she was employed by the respondent in 1985 as a Store Clerk at kitale Depot and then taken to Narok silo after a promotion in 1998. She was suspended on 6th July 2007 and was terminated on 10th June 2008. That on 30th July 2007 there was theft of wheat at the Narok silo, the Security Manager Mr Terer reported to the police. After one month auditors from head office came to the depot and she was told to hand over and sent on compulsory leave on 24th October 2007. On 6th September 2007 a suspension letter had been issued on alleged negligence and loss of 860 bags of wheat. On 11th November 2007 she wrote her defence on the allegations noting that her work was to keep records which were properly filed.

10. On 3rd March 2008 the witness was called for a hearing, she defended herself noting that all her records were accurate and from these records, it was detected that more wheat had been collected while in actual sense there was no wheat delivered. On 4th April 2008 the respondent wrote and indicated that she was to contribute to the losses incurred in 2 months but rejected this directive as there was no link to her with regard to the wheat loss of 860 bags. On 8th June 2008 she was terminated. She lodged an appeal but there was no response. She lodged a complaint with the union but there was no agreement and hence the claim in court. The claim is based on victimisation as there was no evidence linking the witness to the losses of wheat and where there was a loss there was a security firm guarding the premises and the matter was reported to the police. That there was unfair termination as due process was not followed. Since the termination she has suffered psychologically trying to seek justice for 12 years and had the respondent done proper investigations, she should never have lost her job with them.

11. In cross-examination, the witness confirmed that her duties entailed records keeping of all transactions at the Narok silo which included noting all the wheat received and dispatched and made reports to the Silo manager. At some point between July and August 2007 she noted the loss of 50 bags after doing reconciliations and when this was raised by SAC during the hearing of her case, she gave an explanation. There were many mistakes that arose with the records but there were verbal explanation given. In one case there was an over issue of wheat to one client but this was corrected and a verbal explanation made. In July 2007, Sammy Bett [1st claimant] was the Cashier and the Acting Silo Manager and was responsible for the release of wheat. He was the Store Manager as well and one client Ms Rose Kilel returned 35 bags after it was discovered that there was an over-issue to her. That the risk of over-issue of wheat was that some farmers made losses and would cumulatively affect the services of the respondent.

12. The third witness Daniel Nkanata gave evidence that he was employed by the respondent in 1989 as a Dryer operator to dry wheat. There were no problems in his department but he was accused that there was a loss of 860 bags of wheat and he was alleged to be responsible but has never been charged in court. The matter of theft and break-in was reported to the police but he was not involved. When the wheat got lost, the Manager had locked the gate and left with the key. All wheat was weighed at the bridge and would be released based on the records. All top-ups that were made to compensate any spillage were recorded. The dryer he operated had a leakage which he realised later when he was accused of the loss of 860 bags. He was terminated and reported the matter to the union which failed to resolve the matter hence the case in court.

13. In cross-examination the witness confirmed that as the Dryer Operated he released wheat based on records. At the dryer he checked the moisture content and after drying it would be recorded and the client would collect based on the records. There was a process that each client followed from the weighbridge until the release of the grains or wheat. No wheat was released without a document of release from the records office signed by the Manager. No wheat was released without his knowledge or the other dryer manager Mr Omuga. In the case of Ms Rose Kilel the customer who was over-issued with 50 bags of wheat, this was reported to the Manager who decided on how the over-issue was to be returned. When there was a breakage of the dryer he reported to Mr Sitienei for maintenance.

14. The 4th witness Reuben Kenduiwa gave evidence that he was employed by the respondent from 1996 as a Clerical Assistant and in 1995 he was promoted to Weighbridge Clerk. In July 2007 he was recommended by the Manager to do Grading as there was no clerk as the previous one was on leave and a replacement had not been done. This was done verbally as it was temporal and the crop delivery was very high. He had to measure the moisture. The Depot Manager and his supervisor were aware. All the records were kept for analysis. There are 3 silos that required a lot of movement especially in July 2007 when deliveries were high. He was all alone in the office and did grading using the necessary sheets and when out of the weighbridge to attend to other duties, there was Celestine Salash who was left in-charge. At the weighbridge there was a computer that took all the records and where there were variances this would be due to moisture and the necessary changes would be made after storage or drying. In August 2007, he was told that some wheat was missing and that there was a shortfall of 860 bags after a farmer called Dhillon complained that there was huge loss of his wheat. He was told to pay together with 6 others when the respondent divided the loss and he was surcharged.

15. The witness also stated that he was called by SAC for hearing but no farmer was called to give evidence that his wheat got lost. He was accused of recording reduced moisture for a farmer called Kimbui but this farmer was never called. There was no record of his complaint. There was theft that had occurred at the depot and this was reported to the police but he was not charged. There were private security guards at the depot, the contract was terminated and a new firm contracted.

16. In cross-examination the witness stated that he did not manipulate the records of moisture as once he did the grading the Dryer Manager would also record the moisture before allocating the bin. That the determination of what moisture was to apply was negotiated but no money exchanged hands to reduce it or increase. That where there was a loss of grains at the silo, this would involve several people as handling to all transactions required team work. In this case, he did his work well and was not responsible for the loss of any wheat or grain.

17. The 5th witness was Mr Joel Omuga the 5th Claimant. He was employed by the respondent in 1990 as a Casual and later was posted to Awendo, transferred to Migori as a Watchman in 1997 and then promoted to a Dryer Operator and sent to Narok silos. He was accused of stealing 860 bags of wheat while undertaking his duties of drying wheat; cleaning the wheat; removing chaff and storage. All the wheat he handled was from grading office, weighbridge all with records. He had to check the moisture together with the Plant Supervisor who would confirm and sign. He did not understand why he was terminated but understood later that 860 bags of wheat got lost after the respondent did an investigation and he was accused of the loss. He was aware that some wheat had been lost as one morning while checking the compound as was routine he found wheat spillage and found the Manager Mr Muhihu inspecting the spillage. They were joined by a watchman and found that the fence had been cut and more wheat was spilled there. The matter was reported to the police and the security firm that was covering the respondent premises had to be changed as a result. He was not called to record any statement with the police.

18. The witness also stated that he was summoned to the SAC hearing with charges of theft and negligence, he did not admit to the charges. He noted that if there were any losses of wheat this could have been as a result of the spillage during the theft or through the difference when removing chaff, moisture differences, drying and at the conveyer some spillage would occur contributing to the loss of 860 bags. When the respondent did their investigations and audit, the report indicated that 1108 bags got lost but he was told that 860 bags had been lost.

19. The witness also stated that he was made to work between places, from his dryer to the weighbridge and would offload wheat. He did these duties without any formal letter especially when the weighbridge officer Ms Salaash was away on leave. After the hearing by SAC he was told to pay kshs.430, 000.00 as his contribution to the financial loss. He was aware that Ms Rose Kilel brought her wheat to the respondent silo but he did not work with her even though she was the sister-in-law to Lear Kiget [[2nd Claimant] but was aware of the incident where Ms Kilel had to return over-issued wheat. He therefore lodged an appeal when he was terminated but he has never received any response and is therefore seeking to be paid in lieu of notice that was never issued, compensation for unfair termination

and damages due per the CBA, costs and an issue of Certificate of Service.

20. In cross-examination, the witness confirmed that he was not responsible for the loss of 860 bags of wheat as alleged by the respondent. He left his work at the dryer to Mr Oseko and went to the weighbridge but no formal letter was issued to him to attend to the duties at the weighbridge. Over-drying of wheat can result in a loss and the operator was responsible for the overall quality of the commodity which would be recorded on the grading sheet.

Respondent's case

21. In defence the respondent stated that they had a CBA with KUCFAW and the claimants were members. The respondent commenced investigations into the loss of 860.37 bags of wheat belonging to third parties which was under the custody of the respondent, the claimants were suspended according to clause 27.5.1 and 27.5.2 of the CBA on 6th November 2007 and given a chance to submit their defences. From the audit investigations, the respondent in a report dated 24th September 2007 established that the claimants had irregular activities which led to the loss of the wheat. The claimants were all called to the SAC on 6th March 2008 and were interviewed to explain the shortages and after deliberations on their oral, written and audit reports, SAC found the claimants responsible because they were all found in the losses of the wheat. These losses were to be shared equally between the claimants and were given two (2) months to pay but refused and on 10th June 2008 the respondent took the decision to terminate the claimants. The termination followed the terms of the CBA and there were valid reasons for the termination in that the claimants were found negligent while carrying out their duties and responsible for the loss of 860.37 bags valued at kshs.3, 000.00 per bag and the claimants were unable to make good of the loss. This negligence by the claimants was that;

The 1st claimant failed in his duties in the intake of wheat and failed to hand over to the silos Manager when he resumed duty;

The 2nd claimant as Records Clerk did not provide supervision which led to manipulations of records and failed to know the true stocks and admitted there was an over issue;

The 3rd claimant while operating Narok 1 Dryer caused losses, he admitted there was an over issue and was aware that wheat was getting lost;

The 4th claimant operated the weighbridge through which some losses resulted, he manipulated moisture by declaring less moisture content causing the respondent loss of revenue; and

The 5th claimant as a Dryer Operator and acting as weighbridge clerk accepted responsibility as he received wheat in the dryer and dispatched the same and while attending at the weighbridge his work as the dryer was not supervised and while at the weighbridge losses of wheat occurred.

22. The claimant also stated that the terminal dues for the claimants were all paid and nothing is outstanding. From the terminal dues there were deductions occasioned by the losses incurred due to the negligence resulting from claimant's activities. The respondent suffered further losses as 860.37 bags of wheat after the claimant failed to fully pay even upon deductions from their terminal dues and huge sums are still unrecovered. Notice pay was made to the claimants after their termination in line with CBA and any pending leave days were all paid. There were no owing allowances or gratuity. Compensation is not due as this was not a case of unfair termination and the same followed the provisions of the CBA. The 1st to 4th claimants have been issued with Certificates of Service but failed to collect them while the 5th claimant has already collected his Certificate from the respondent.

23. The respondent complied with the provisions of section 43, 41 and 35 of the Employment Act in

addressing the claimant's case. The CBA was also followed in this case. The claimants were each entitled to their terminal dues and the deductions effected were based on the losses incurred due to their negligence;

1st claimant had Kshs.45, 156.25 and total deductions were kshs.430, 000.00 and the respondent is claiming Kshs.384, 853.75;

2nd claimant had kshs.56, 421.40 and total deductions were kshs.430, 000.00 and respondent claims kshs.373, 578.60;

3rd claimant had Kshs.38, 499.20 and total deductions were Kshs.430, 000.00 and the respondent is claiming Kshs.391, 500.00;

4th claimant had Kshs.37,108.80 and total deduction from owing house rent Kshs.34,732.65 together with total losses owing at Kshs.430,000.00 and the respondent is claiming Kshs.427,623.85; and

5th claimant had Kshs.45, 905.50 and owed Nafaka Kshs.49, 938.00 and the total deduction on losses amounting to Kshs.430, 000.00 and the respondent is claiming Kshs.434, 032.50.

24. The respondent stated that in the circumstances of this case, the claimants have not come to court with clean hands having failed to indicate their culpability and the case should be dismissed. In the interests of justice and in the nature of fair labour practices, the respondent should be awarded costs.

25. In evidence the respondent witness was Zephaniah Chokecherry Chepchieng the Industrial Auditor with the respondent and did the initial investigations of the case against the claimants. On 5th September 2007 he was asked to conduct an audit at the Narok silos into the circumstances which might have led to reported shortages at Narok silos and on 6th September he visited the silos and had a meeting with 10 managers. The 1st claimant by virtue of his position introduced him to the other staff at the silos. He reviewed all the processes from the point where client deliver grains and to dispatch. There was also a security company that was under the supervision of the Manager who kept a register but there was a parallel register that the manager did not sign as it was not authorised. In the unauthorised register, he traced its origin to the weighbridge a confirmation that what was delivered and passed the weighbridge was not properly recorded. The motive for this parallel system of registration was not disclosed.

26. The witnesses reviewed the produce register where moisture is recorded and Reuben Kenduiwa was responsible. He was supposed to maintain records but there were inconsistencies with no explanations; There were omissions that resulted in wrong recordings; There were cancellation of initial entries on the grading as the source document; documents were not signed an indication that the person assigned the task did not properly determine the moisture content. The Produce Inspector had the role of determining the grain moisture which had to be determined at the point of delivery of the crop and at the dispatch point. There was an equipment to do this task with a spread sheet that is serialised and all the established parameters were to be established as all other processes are dependent on the established parameters and all the other processes that come after are dependent. Therefore the role of the Produce Inspector was crucial, all commodities coming into the silos elate to the inspection. The audit revealed that the moisture content was not independently or reliably declared and the initial declaration was cancelled and the initial high moisture level recorded were cancelled and reduced. The implication of this was to give a false result. In these circumstances once the grain was dried the residual result would be different to what would be released to the customer. Where there was an omission on non-declaration, this affected the drying process which is dependent on the final product. He talked to the 4th claimant but he had no satisfactory explanation of these omissions. This negatively impacted on the respondent and in the process of review one farmer whose grain was not declared and had a dispatch of what he had expected to receive and upon reconciliation it was not clear if this farmer got excess thus contributing to shortages.

27. The witness also gave evidence that at the weighbridge the clerk had the duty to receive trucks and weigh them and give a serialised ticket and declare all the net weight using the grading sheet. In the absence of the grading sheet from the Produce Inspector, the clerk had no basis to pass or admit the commodity. That this is sensitive work and the accounting documents are important. There lacked supervision where the silo in-charge, the 1st Claimant, allowed other staff not responsible as clerks to operate the weighbridge and worked beyond office hours. The officers found responsible were Reuben Kenduiwa, the Produce Inspector and Joel Omuga the Dryer Operator, Security Guard Mr Terer who was allowed by the silos Manager to operate the weighbridge. In the audit review, the witness found the 4th and 5th claimants while at the weighbridge did not record some dates and never declared the weights in other cases and the reasons for this non-declarations was not indicated. They kept private note books with records which were contrary to procedure as there was a serialised record always available to take these records.

28. At the time these malpractices were taking place, the 1st claimant, Sammy Bett was the acting Silos Manager charged with the responsibility of directing all activities at the silo according to respondent policy. All activities were supposed to be coordinated. In the audit findings, the 1st claimant failed to offer supervision on all the other claimants, the 2nd claimant as the Records Clerk failed to maintain proper record and some records were not accessible; the 3rd claimant was the dryer operator but kept no records; the 4th claimant as Produce Inspector had partially maintained records; and the 5th claimant as dryer operator had no records for review. Their supervisor, the 1st claimant never did his work.

29. In the audit review the 2nd claimant, Lear Kiget as the records clerk of the silo and by virtue of her position she was supposed to coordinate all the activities of the others. She had to see the gate records are kept; records at the weighbridge are well done and maintained and the Produce Inspector had complete records and the 2 Dryer Operators raised the required documents and update them as required. He found that the records were not maintained or partially maintained or were not there for review. During the disposal/dispatch stage where there were proper records, no losses would have occurred but in this case, without proper records, losses did occur. In this process the audit revealed that Ms Rose Kilel collected excess grain than was delivered and had the records been well maintained, this could have been detected immediately. That the dryer operator indicated that he was required to top-up some trucks which were not in consignment. This top-up was not authorised by the Manager. This top-up was the process where a customer asked for a set tonnage and if at the loading weighbridge record indicated less, the truck was allowed in and back to the dryer for more loading to cover for the expected weight. Where proper procedure was not followed to establish the rationale for the 2nd loading, this would result to an over-issue and loss to the respondent. Some Lorries were allowed without proper records and weights taking which also affected the overall quantity and a loss to the respondent. This was the core responsibility of the 2nd claimant. The witness waited for over a week to access the records and those available were not updated. These omissions were as a result of the 2nd claimant failing in her duties.

30. The Dryer Operator was supposed to receive grains and before offloading he was to confirm that it had passed the Produce Inspector with a grading sheet at the weighbridge, noting the moisture and tonnage to help determine the weight after drying. The dryer operator was to raise a control document to indicate the weighbridge ticket Number and the initial tonnage. The moisture is supposed to be monitored as it drops to the expected level for dispatch or take for storage. The drying analysis must be done. In the audit review it emerged that this document was missing and where available it was not maintained. This was a serious lapse as the basis for releasing dried wheat/grain to the client could not be established based on any document. It was not clear why the dryer operator released the grain thus exposing the respondent to a point that there was no accounting system to the farmers who redelivered grains. After reconciliation, it emerged that the dryer operators failed in their duties.

31. The 5th claimant as a Dryer Operator had similar duties like the 3rd claimant. He failed to maintain records that were required. In some cases, he allowed an unauthorised person to operate the dryer in his absence and in this case he exposed the wheat in his dryer to non-accountability. It was not possible to establish who the third party was or whether he was doing the right thing as one with the knowledge on

how to operate the dryer was the claimant as the accounting officer. The audit review noted that while the dryer was running the claimant was busy at the weighbridge and could not effectively run the two office accurately and in a manner that was accountable and this was in conflict with his role as management had not authorised him to do the two duties. The weighbridge is far from the dryer and operated by electricity and when grain was left unattended in the conveyor, it got over-exposed in the dryer or the conveyor would route the grain to another bin. For the officer to be at the weighbridge it allowed collusion and malpractice as truck would be allowed in without proper accounting system. In the audit it emerged that while the 5th claimant was at the weighbridge the on 10th to 13th July 2007, the printer for records was off and the records were never updated or the supervisor altered. It was not possible to establish what had been delivered or dispatched and when he was interviewed, there was no proper explanation. It emerged that the systems were compromised by the failures of the 5th claimant.

32. Overall, 860 bags of wheat were established to have been lost and the farmers who had delivered their crops had nothing to collect. After reconciliations following complaints by five (5) farmers, the witness noted that 860 bags were missing. Each farmer had a portion that was never dispatched and the silos manager could not give a proper account for the loss while the silo bins were totally empty. This loss was occasioned by the fact that Daniel Nkanata over issued 53 bags to Ms Rose Kilel without justification; Lear Kiget the Records Clerk delivered her own wheat for drying against respondent regulations as she was supposed to have declared to avoid conflict of interest; some records with regard to Ms Rose Kilel were cancelled and allocated to Leal Kiget at 242 bags without any justification. Despite offering an explanation that the 2nd claimant, Lear kiget was farming wheat, the quantities could not be established and this was contrary to respondent policy. Where other farmers lost their grain, the 2nd claimant did not lose any. There was a case of improper weight taking; on 21st August 2007 the 5th claimant loaded motor vehicle KAW 061 V done out of the office hours and without authority of the silos manager or involvement of the weighbridge clerk. He directed the truck to Sewe and thus acted in an irregular manner and outside his assigned duties. On 1st August 2008 there was reported theft but the silo manager never reported to the police or to the respondent management contrary to policy. The security guard Mr Terer was allowed to operate the weighbridge together with Mr Omuga who also went to report the theft to the police but not to management. This became a strange allegation and a failure of the silo Manager. When the witness followed up case, he went to the fence alleged to have been broken but the same was intact without breakage, the wires were squeezed with foot prints and little spillage of grain of a packet. The silo bins had not been broken into and if it had been a theft this could not have been for 860 bags of 90 kilograms as this would have required 2 trucks to load and this could not have been done at the fence. Even where this could have been a factor the amount of grain involved was too high not to be noted by the responsible manager. The manager never reported but left it to a third party Mr Terer. The audit review established that this was an isolated case that had no bearing in this case. Mr Terer was hired by a private security firm to guard the Silos and was not an employee of the respondent and was not allowed to undertake respondent activities as he was allowed to attend at the weighbridge, report to the police about the theft before the Silo Manager did investigate the matter internally. Where the grains are stored, there are chains or padlocks and when the audit team inspected them, the required procedures were not followed as these were left unlocked creating a set up as these are supposed to be locked when the responsible officer is away and leave the key with the Records Clerk. No theft was reported to the respondent and the audit team only heard about the theft when they went to the depot. All wheat is stored in bulk and to take away 860 bags of 90 kilograms each in one night, one requires having 2 lorries/trucks. This would also require a well-coordinated process, with somebody who had personal knowledge of which conveyor to use and the storage bins with the grains. It required the knowledge of the person running the dryers, the person at the gates which has a barrier with the locks kept by the silo manager.

33. The witness also stated that the respondent lost 860 bags of wheat and the claimants could not give a satisfactory explanation for these losses. That had the claimants done their work well with diligence, responsibility; there would have been no room for the loss. It was a coordinated loss as no one person could have managed alone. The claimant jointly contributed to these losses.

34. In cross-examination the witness confirmed that his investigations was as a result of farmers complaints from their deliveries to the respondent and when they went for collection, they had nothing.

There were;

R.M. Patel who lost 22 bags of wheat delivered on 2/7/07;

John Wambugu who lost 166 bags of wheat delivered on 22/6/07;

Patrick Kibui who lost 42 bags of wheat delivered on 25/6/07;

SS Dhillon lost 509 bags of wheat delivered on 27/7/07; and

Patrick Muturi who lost 183 bags of wheat delivered on 9/7/07.

35. There was partial keeping of records and the Produce Inspector had made alterations on the moisture contents. These alterations were not counter-signed to confirm the exact figures and information. There were manipulations and omissions done by the claimants that left the respondent unable to ascertain the correct status of things leading to complaints by farmers who expected services from the respondent. The variances were noted to the claimants but failed to give a satisfactory response. That when the losses occurred the Narok depot Manager Mr Mahihu was on leave and there was no assistant Manager and the 1st claimant was acting. The Plant Inspector Mr Sitienei was present but his duties were technical and mechanical and were not supervising any staff. Mr Mutai was the IT Manager and only processed the documents forwarded to him but most records that were manipulated by the claimants especially the 2nd claimants were never forwarded to him. The claimants kept pocket diaries instead of using the approved serialised records and these private records taking were never forwarded to the audit team.

36. The second respondent witness was Mr **George Abila** the Assistant Manager and stated that he got a report from the respondent regional office about the loss of 860 bags of wheat and advised that an audit team to conduct investigations. The losses were confirmed and the claimant found culpable and they were suspended to help the respondent know what had happened. A hearing was held where the claimants were invited to attend the Staff Disciplinary Committee (SAC) to explain following their written defences. The witness was the Secretary of SAC and other members were drawn from different other departments. SAC gave recommendations to the CEO. The 1st claimant was charged with the loss of 860 bags of wheat as the responsible person as the depot when the loss occurred whose explanation that when he handed over he could not ascertain the contents of the bins was found not satisfactory. The committee established that had the 1st claimant used the dipping method, he could have been able to ascertain the quantity and as an experienced employee he knew what his duties were and in this case he contributed to the losses and hence liable. He was terminated due to negligence of duty.

37. He also gave evidence that Lear Kiget the 2nd claimant as the Record Clerk knew the amount of grains delivered and dispatched. She failed to keep records and participated in wheat trading and over issue of wheat and a case of conflict of interest. She was found to be dishonest and manipulated records resulting in the losses and thus the termination. The 3rd claimant as the Dryer Manager was also interviewed following a case where he over-issued grains and topped up in some cases done at night beyond his work hours. That he also admitted to having wrong weights on Lorries at the weighbridge leading to the losses and was thus terminated. The 4th claimant as the Weighbridge Clerk did wrong grading and poor records keeping and admitted that some farmers gave him little cash as appreciation which in effect led to alternation of documents and failing to note the correct moisture. This led to the overall losses and was therefore terminated. The 5th Claimant was a Dryer Operator but worked at the weighbridge and left his place of worked not attended to or being attended to by third parties leading to tampering of moistures and over-drying and some farmers were issued with more grains than they ought to have and was therefore terminated.

38. From investigations, the witness discovered that the Depot Manager Mr Muhihu blamed the acting Manager the 1st claimant, who in turn blamed the other claimants for the losses of 860 bags of wheat. The respondent had laid out procedures but all the claimants failed to follow them leading to the losses. The

claimants were terminated and the respondent followed the applicable CBA which provided for;

Payment of 2 months;

Payment of provident fund;

Leave due;

Staff savings;

Days worked; and

Medical allowances.

39. That all these dues, were computed and the respondent recovered the losses it incurred. The losses were due to the negligence of the claimants and therefore, these the respondent had to recover from them and some is still outstanding unpaid. This recovery followed the terms of the CBA. The 1st claimant has not repaid kshs.384, 853.00; 1st claimant has not repaid Kshs.380, 000.00; the 3rd claimant has not repaid kshs.385, 500.00; the 4th claimant has not repaid Kshs.464, 000.00; and the 5th claimant has not repaid 434,032.00 all due to the respondent following the losses.

40. In cross-examination the witness confirmed that there was no single document that the respondent had to explain the total losses of 860 bags as these losses were gradual. There was no formal complaint from any farmer but one lorry had been arrested, detained but later released by the silo manager as there were security guards contracted to ensure safety and security at the depot. The farmers who made losses were compensated by the respondent but these payments in compensation were not brought to the notice of the claimants. The losses occurred when the 1st claimant was the acting silo manager as the Manager was on leave. There were other employees at work during this period and were all answerable to the 1st claimant. Duties were allocated formally or verbally based on the need but there is no duty roster to confirm which employee was allocated which duty.

41. That the SAC proceedings were internal hearings. The interviews and hearings were conducted by fellow staff on the claimants. The CBA was followed and minutes taken. The recommendations to terminate the claimants were done by SAC following the internal hearing. The claimants were asked to pay for the losses and were given time to do this but they failed. There was a second SAC hearing where the claimants were to given their responses in writing and their physical attendance was not required. The decision to terminate was done in writing.

42. The witness also told the Court that he was aware that the claimants were all unionised but at the Narok silo there was no shop steward. There was also no union representative when the claimant's cases were heard by SAC and a determination of their cases done.

Submissions

43. In submissions, the claimants stated that the reasons for their termination were never proved against them. The evidence of theft did not arise as the respondent Narok depot was guarded and no criminal charges were made against them. The termination could therefore not be justified within the meaning of section 43 and 45 of the Employment Act which bar employers from dismissing an employee unless there is a valid and justifiable reason. This was not a case that warranted a dismissal and the claimants should be granted their claims as prayed.

44. The respondents on their part submitted that the suit by the claimants is statute barred with regard to limitations period as under section 90 of the employment Act. Termination was on 10th June 2008 and the claimants filed their suit on 1st march 2012 four (4) years after the cause of action arose. That the court has no jurisdiction to extend time to allow the claimants to lodge the claim and the same should be

struck out.

45. Further, the respondents submitted that there was a valid reason for the termination of the claimants pursuant to section 43 of the Employment Act, the respondent incurred losses due to negligence of the claimants, and there were investigations that found all the claimants culpable. That the 1st claimant admitted on the loss of 860 bags of wheat at the respondent Narok Silo depot but denied that he was not involved while the 2nd claimant admitted there was loss but denied tampering with the records and the 5th claimant stated that the dryer operators were the one who knew the quality and quantity of wheat and where there were losses they would be responsible. Following the losses, the respondent undertook an audit and this was confirmed by the evidence of their witness who established there were malpractices that linked the claimants to the loss of 860 bags of wheat. The claimants were suspended and later called for a hearing by SAC where each claimant blamed the other for the losses. The hearings were held on 6th March 2008 where each claimant was heard and directed to pay for the losses incurred by the respondent and they each refused and a follow up meeting of the respondent made a decision to terminate each of the of the claimants and recover the losses from their terminal dues. That the respondent thus met the requirements of section 41 and 43 of the Employment Act on the basis that there was a valid reasons for the termination and the claimants were taken through hearing after their suspension which was ample notice to them to prepare for the hearings.

46. Due process was followed in the process of termination and the applicable CBA made reference to. Each claimant was given the reasons for termination and each claimant given a chance for hearing. The remedies sought are therefore not warranted and each claimant should be made to pay what is due and owing to the respondent.

Determination

The issues for determination arising from the pleadings and submissions are:

Whether the dismissal was wrongful and or unlawful

Whether the claimants are entitled to the reliefs sought

47. It is common cause that the parties herein were covered by a CBA running from 1st July 2005 to 30th June 2007. The claimants were unionised under KUCFAW with whom the respondent had a Recognition Agreement.

48. This is crucial in this regard as on **25th January 2013** the respondent filed a Notice of Preliminary Objection noting that the suit was statute barred. Where employees are unionised and that union has a Recognition Agreement with the employer, there are rights that flow. Once a dispute does arise, such a union is to report the dispute to the Minister which I find in this case was done by KUCFAW. On **1st March 2011** the Minister through the Chief Industrial Relations officer wrote to the parties herein noting that KUCFAW had on **7th December 2010** lodged a dispute with them. There is no further record on whether the Conciliator appointed, Mr Mwaniki, following the Minister communication with the parties did hear the parties and whether a Certificate was issued. None of the parties herein went into this issue particularly the claimants who were served with the Notice of Preliminary Objection by the respondent way back on 25th January 2013. That notwithstanding, I take note that this is a dispute that was handled by the Minister pursuant to section 65 of the Labour Relations Act and section 87 of the Employment Act. The claimants cannot therefore be said to have sat back and did nothing as unionised employees and waited until the provisions of section 90 of the Employment Act made their claims out of time. The record of the Minister, though not final as the Certificate required cannot be ignored by this Court the only disadvantage the claimants suffer for failure to provide the Certificate from the Conciliator is that time will be calculated from the date of that document being dated 1st March 2011. Where the cause of action arose on 10th June 2008, the dispute was reported to the Minister who referred it to reconciliation on **1st March 2011**. The claimant was filed on **1st March 2012**, a year after. This then addressed the

question of time with regard to the Provisions of section 90 of the Employment Act noting the provisions of section 65 and 87 of the Labour Relations Act and the Employment Act respectively.

49. The fact of the unionisation of the claimants goes beyond the Recognition Agreement their union had with the respondent. There was a CBA that was to guide parties in the event of disputes handling. Where the CBA fell short of addressing disputes handling mechanisms, the law applicable comes into effect.

50. On divers' dates, the respondent received report on the loss of 860 bags of wheat at the Narok silo depot. An audit team was sent to review the matters. As a result, on **6th November 2007**, the claimants were suspended from duty to enable the respondent undertake investigations. The claimants were advised to give their responses on the accusations and or allegations against them within 72 hours. On **6th March 2008** the claimants were all invited to an interview with the respondent Staff Advisory Committee (SAC). Upon their deliberations, the respondent on **4th April 2008** gave notice to the claimants that they were found responsible for the loss of 860 bags of wheat and were directed to pay for the loss within 2 months. On **10th June 2008**, the claimants having failed to pay for the losses as directed on 4th April 2008 were all terminated, which termination was to take effect from **6th November 2007**.

51. The claimants were all terminated following what the respondent noted as;

TERMINATION OF SERVICE

Refer to the interview you attended before the Staff Advisory committee at head Office on 6th march 2008 and our letter dated 4th April 2008.

After a thorough deliberation of both your written and oral defence, the management has decided to terminate your services with effect from 6th November 2007.

Consequently you will be paid three months' salary in lieu of notice and any other benefits that you are entitled to in accordance with the terms and conditions of service.

However please note that your payment of the above dues will be subject to your completing the clearance certificate which is hereby enclosed.

52. Therefore, by this communication, the respondent severed their relationship of employer and employee with the claimants. Was this what is expected to happen to parties who have unionised employees? Were the procedures applied in the termination of the claimants what is contemplated in law?

53. Section 41 of the Employment Act is important to quote here;

41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

54. Both parties acknowledge there was a Recognition Agreement between the claimant's union KUCFAW and the respondent. The union was not notified of the suspension of the claimants nor were they invited to attend at the SAC interview or at the hearings. Even where there was no shop steward based at the Narok silo depot, the law in this regard required the claimants as employees, where faced with serious disciplinary issues to be heard in the presence of their union representative or in the presence of an employee of their own choice. This is a mandatory requirement of the law that finds justification in the roots of natural justice as held in the Court of Appeal decision in **Kenya Revenue Authority v Menginya Salim Murgani [2010] 1 EA 166 delivered on 16th July 2010**.

55. The provisions of section 41 are couched in a manner that that where not addressed by an employer before a termination or dismissal, the outcome decision is fundamentally flawed however serious the misconduct of an employee is. In this case, the respondent as the employer in due acknowledgement that they had a CBA with KUCFAW, the least that they were expected to do before running interviews and Hearings with regard to any alleged misconduct by the claimant was to inform the union and even where they were not able to inform the union, to cause the claimants to have an employee of their choice to be present at the hearings and or interview as the allegations facing them were serious enough to require such attendance. It cannot be justified now that the claimants were asked to make good the losses the respondent incurred through their acts of omission or commission, the due process in this case required that before termination, hearing of any misconduct was to be as outlined at section 41 of the Employment Act.

56. Where there is proof that the internal disciplinary procedures are conducted in a manner as to infer the process was undertaken in disregard to the tenets of natural justice, the same becomes a sham. A notice to an interview following a suspension issued to an employee is an enquiry as to whether or not disciplinary proceedings should be commenced by an employer against such an employee if where the enquiry establishes that there is no good cause, there is no action taken and where the enquiry establishes that there is a good cause, then disciplinary proceedings can commence in the presence of a union representative or a fellow employee. Disciplinary proceedings require an employee being given a chance to defend themselves.

57. In this regard due process is important. where due process is applied with regard to employment, where there is a good cause to believe that an employee should be terminated due to any misconduct or gross misconduct, the use of internal regulations by an employer and the law applicable in each case for misconduct or gross misconduct must be applied in a manner that is reasonable in the circumstances of each case as held by this Court in **Petition No. 29 of 2012 Laban Wahome Matiru versus the Attorney General**.

58. The outcome decision of the respondent where the law was not followed with regard to hearing the claimants cannot therefore be justified as being fair, reasonable or within the law. I find the termination of the claimants was contrary to laid down mandatory provisions of the law and the same was inherently unfair within the meaning of section 45 of the Employment Act. Nothing prevented the respondents from following the law. There was no evidence of any extraneous factors in this omission so as to justify non-compliance. The respondent extensively quoted the CBA with regard to payment of terminal dues hence they had the knowledge of clauses 27 with regard to handling disciplinary cases and Clause 29 with regard to payments with regard to any damage or losses caused by an employee. There is no explanation as to why the respondent followed some parts of the CBA and failed to follow other parts thereof. This is an unfair labour practice.

Remedies

59. The claimants are seeking notice pay that was admitted by the respondent as due for two (2). This will be awarded at two month's gross pay as earned at the time of termination vide notice dated 10th June 2008. The respondent also admitted owing in Payment of provident fund; Leave due; Staff savings; Days worked; and Medical allowances. Provident Funds should be managed according to Retirement benefits Authority Act rules separate from the respondent and save for this item the respondent shall be compute leave days due, staff savings, days worked and medical allowances unpaid and effect these payments to the claimants.

60. On the claim for damages, from the evidence of the 1st and 2nd claimants Sammy Bett and Lear Kiget, it emerged that they were traumatised form the whole experience of their termination and in pursuit of justice in this case. There was however no evidence that apart from filing this claim where they seek costs, they have been forced to incur or costs or related expenditures that required any psychosocial support. This will be addressed by the court in the prayer on costs and the due compensation in awarding the claimants for their unfair termination.

61. Save for the unfair termination of the claimants, the respondent should have kept the claimants at their employment. Termination notice issued on 10th June 2008 made the date of termination as 6th November 2007. This was the date the claimants were placed under suspension pending the hearing and outcome of their alleged misconduct. This in essence denied the claimant a chance to keep their employment as they went through the hearing process. any salaries that are due and not paid for the duration of 6th November 2007 to 10th June 2008 should have been paid as this was the date that termination notice was issued and should have taken effect had due process been applied. The respondent is to therefore compute all owing salaries the claimant were entitled to for this period within 14 days from the date hereon.

66. For the unfair termination and taking into account the above findings, the court will awarded each claimant One month's salary in compensation for the unfair termination.

67. From the defence, the respondent outlined losses that they held the claimants accountable to. I find no counter-claim in the statement of response for the court to find justification in awarding this claims by the respondent as a counter-claim is a fresh suit where a claimant or respondent in this case should be given a chance to reply. It is an independent action by the respondent as against the claimant. It is a cross-claim and the principles of pleadings which govern a counter-claim are substantially the same as those, which would apply to a statement of claim in a cross-action brought by the respondent against the claimant. Where a claim must comply with the Rules of the Industrial Court or in the case where Order VII, rule 1(2) of the Civil Procedure Rules, then by parity of reasoning a counter-claim must equally comply with the mandatory provisions of Order VII and the relevant rules therein.

I enter judgement for the claimants against the respondent in the following terms

- 1) Declaration that The termination of the claimants was unfair;**
 - a) Each claimant is awarded one month's gross salary as compensation;**
 - b) Notice pay is awarded at two months gross salary;**
 - c) The respondent to compute and pay the salary due and unpaid to the claimants from 6th November 2007 to 10th June 2008 within 14 days from the date hereof;**
 - d) The respondent shall within 14 days compute and pay all outstanding leave days due, staff savings, days worked and medical allowances unpaid to the claimant.**
- 2) The dues arising from (1) above shall all be computed based on the gross pay due as at 10th June 2008;**
- 3) Claimants awarded 50% of their costs herein; and**
- 4) The Court shall mention the matter on 18th September 2014 to confirm compliance.**

Read in open Court at Nairobi this 30th Day of July 2014.

M. Mbaru

JUDGE

In the presence of:

Court Assistant:

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