



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 111 OF 2013

(Originally Nairobi Cause No. 1069 of 2012, later Nakuru Cause No. 29 of 2013)

SAMUEL MUCHIRI GIKONYO.....CLAIMANT

v

HENKEL CHEMICALS (EA) LTD.....RESPONDENT

JUDGMENT

1. Samuel Muchiri Gikonyo (Claimant) filed a Memorandum of Claim against Henkel Chemicals (EA) Ltd (Respondent) and he stated the issue in dispute as *unlawful and unfair termination of employment*.

Claimant's pleadings and case

2. The Claimant was appointed as a Storekeeper based at Ruiru by the Respondent through a letter dated 22 April 2008. The letter provided for probation of 3 months.
3. The Respondent through letter dated 24 January 2009 informed the Claimant that after successfully completing the probation, he was being confirmed in appointment as Assistant Storekeeper backdated to 22 July 2008. The Claimant, in Court faulted this confirmation to a lower post.
4. On 3 August 2009, the Respondent informed the Claimant that he had been appointed as Mombasa- Mbaraki Branch Storekeeper at a new monthly salary of Kshs 25,000/-.
5. On 10 May 2011 the Respondent wrote to the Claimant informing him that he had been appointed Acting Internal Auditor with immediate effect and reporting directly to the Board of Directors. All other terms and conditions of employment were to remain the same.
6. On the same day, the Claimant wrote to the Respondent seeking, in line with the new duties, that his salary should be reviewed.
7. On 23 May 2011, the Respondent's Directors replied to the Claimant's letter and informed him that his remuneration had been enhanced to Kshs 70,000/- with effect from 1 June 2010.
8. On 13 September 2011, the Respondent wrote another letter to the Claimant, this time informing him of his appointment/promotion as Group Internal Auditor of the Respondent's group of companies at a salary of Kshs 120,000/- per month. This was after the Respondent's Human Resource Manager advised the Respondent's Director on Kshs 120,000/- as appropriate salary for the position through an email dated 5 September 2011. A pay slip for September 2011 to demonstrate the new salary was annexed.
9. On 25 October 2011 the Respondent wrote to the Claimant to inform him that his salary was being reduced to the previous Kshs 70,000/- per month because his personal affairs had affected his

- discharge of official duties. The Claimant contended the review of salary downwards was unlawful and without justifiable reason.
10. On 28 March 2012 the Respondent wrote to the Claimant entrusting him with additional responsibility to oversee the management of the Respondent's vehicles in the Coast region. This was after questionable and costly expenditure over the running of the vehicles. The letter advised the Claimant all other terms and conditions of employment would remain the same.
 11. On 7 May 2012 the Respondent summarily dismissed the Claimant through a letter of even date for being suspected of having committed a criminal offence to the Respondent's detriment. The letter gave details.

Respondent's pleadings and case

12. The Respondent denied wrongfully confirming the Claimant to the position of Assistant Storekeeper but pleaded that what it did was to change the title of the Claimant's position on transfer to Mombasa.
13. The Respondent further admitted appointing the Claimant as Acting Internal Auditor with a salary of Kshs 70,000/- from 1 June 2011 and not 1 June 2010 so Claimant was not entitled to arrears from 1 June 2010.
14. The Respondent also admitted appointing Claimant as Group Internal Auditor on 13 September 2011 while based in Arusha at a salary of Kshs 120,000/- per month but the same was reduced when the Claimant fraudulently procured a transfer back to Kenya on personal grounds.
15. On the dismissal, the Respondent contended the same was on the basis of Claimant being involved in systematic criminal acts and that the dismissal was in compliance with the law. According to the Respondent, dismissal was fair and lawful and so the Claimant is not entitled to the reliefs sought.
16. The Respondent called two witnesses, first, its Financial Controller, Mr. Allan Wabwile Wabomba and second, the Internal Auditor, Mr. Wycliff Basweti.
17. Mr. Wabwile stated that on appointment as an Auditor, the Claimant's salary was reviewed to Kshs 70,000/- through letter dated 23 May 2011 effective 1 June 2011 and the backdating of the implementation date to 1 June 2010 was a typographical error which the Respondent noticed only after being served with Court papers.
18. The witness also stated that the Claimant's salary was increased to Kshs 120,000/- on promotion as Group Internal Auditor covering the East African region in September 2011. And when the Claimant returned to Kenya without Respondent's approval the salary was revised downwards to Kshs 70,000/-.
19. On the circumstances leading to the dismissal of the Claimant, the witness stated that it was due to criminal activities (smuggling resin) by the Claimant and that the Internal Auditor carried an audit and confirmed the same through a report.
20. According to the witness, the Claimant had been suspended before dismissal and was given an opportunity to be heard.
21. In cross examination, the witness agreed that the Claimant wrote to the Respondent's director on 1 October 2011 that he was returning to Kenya because his temporary work permit had expired. He also stated that the Claimant was suspended through a phone call and was not given a show cause letter.
22. Mr. Basweti on his part informed the Court that he carried out an audit and that an employee implicated the Claimant in theft of Respondent's property. He also stated that his audit of the records revealed resin would be signed out of the stores but the complete quantities were not received by the relevant section.
23. Mr. Basweti further stated that in the course of the audit he did not meet the Claimant physically but communicated with him through email and did not show the Claimant a confession by a fellow employee called Zipporah. He also stated he never interviewed any security personnel.
24. He further stated he was not aware whether the complete audit report dated 14 May 2012 was sent to the Claimant

Issues arising

25. The primary foundation of the claim being one of unfair termination, the Court will analyse each parties' respective position on the reasons for dismissal and the process followed to determine the unfairness/fairness of the termination before addressing the specific heads of claim.
26. This Cause was valiantly prosecuted and defended, but the Court will only make reference to such portions of the testimony, documents and filed submissions (filed 17 June 2014 and 15 July 2014 respectively) as may be decisive to the determination of the real issues in dispute.
27. The Court will not discuss whether the confirmation of the Claimant as Assistant Storekeeper rather than as Storekeeper because such confirmation or re-designation did not affect the substance of the Claimant's terms and conditions of service.

Whether the dismissal was unfair

Procedural fairness

28. The letter of dismissal gave the ground of dismissal as gross misconduct and the reason(s) as suspicion of having committed a criminal offence to the substantial detriment of the Respondent.
29. Section 41 of the Employment Act, 2007 obliges an employer who is contemplating terminating the services of an employee on the ground of *misconduct, poor performance and or physical incapacity* to notify the employee of the reasons and grant the employee a hearing. The employee has a right to have a fellow employee or shop steward present.
30. Section 41(2) of the Act requires an employer to hear and consider any representations made by the employee if it is a case of summary dismissal. The instant case was one of summary dismissal.
31. The Claimant pleaded that he was not given a chance to participate or respond to an audit carried out before the dismissal, or to give his side of the story, contrary to rules of natural justice.
32. In testimony, the Claimant stated that on 4 May 2012 the Respondent's Assistant Human Resources Manager instructed him to stay at home and after a few days he was called to go and pick a letter which turned out to be the dismissal letter (he sent a colleague to pick up the letter on 11 May 2012 and he got it on 12 May 2012). He also stated he never received a show cause letter and was not informed his dismissal was being considered.
33. The Respondent, upon whom the statutory burden of demonstrating it complied with the procedural fairness safeguards of section 41 of the Employment Act, 2007 fell, pleaded that the Claimant was informed of the reasons for dismissal as required by law. It also sought to show it had complied with the process through cross examination of the Claimant. It also called witnesses.
34. The Respondent's second witness Wycliff Basweti stated that during an audit, an employee implicated the Claimant and therefore he was directed to carry out another audit to establish the facts. He stated that during his audit/investigations he did not meet with the Claimant but they exchanged emails and that by the time the Claimant was summoned by Human Resources department to Nairobi he had already been sacked.
35. Evidence before Court is that an extract of the audit report was emailed by the Respondent's first witness to the Claimant at 12.41 am on 5 May 2012, a Saturday asking him to respond. A complete audit report was sent to the Claimant only after request through emails on 20 May 2012 and 24 May 2012. The Claimant responded on 25 May 2012 though the decision to dismiss him had been made on 7 May 2012.
36. It is not in dispute that the Respondent caused an audit to be carried out by its second witness. The discussion must therefore first turn to whether an audit or investigations carried out to establish facts or unearth the truth can be equivalent to the process envisaged by section 41 of the Employment Act, 2007 or substitute the prescribed process.
37. And to unravel the clue, it is necessary to establish the purpose and or objective of an audit. According to Black's Law Dictionary, ninth edition, an audit is *a formal examination of an individuals's or organisation's accounting records, financial situation, or compliance with some other standards*.
38. In my view, an audit or investigation within the employment relationship is to gather the facts to establish whether there are grounds for a disciplinary action and after the facts have been established the employer should inform the employee of the allegations or facts and give the employee time to make a response.
39. The purpose of a disciplinary hearing on the other hand is to objectively enquire whether an

- employee is guilty of *misconduct, poor work performance* or has some *incapacity* that lessens his ability to perform the job functions to the employer's standard, and for which a sanction such as a warning, suspension or dismissal may be given.
40. To my mind, an audit or investigation, like the one carried in the instant case cannot substitute a disciplinary hearing contemplated by section 41 of the Act because an employee normally does not have the right to bring a colleague/union representative to an audit/investigative interview.
 41. The nature and extent of what is expected of an employer by section 41 of the Employment Act, 2007 cannot be substituted for by an audit or investigation, like the one carried in the case under analysis here.
 42. Section 41 of the Act does not require an employer to hold a mini-court, but a prudent employer and especially one with systems and departments such as personnel or human resources would be advised to keep records/notes of how section 41 of the Act were complied with such as what was the employee charged with/allegations, dates and times of alleged violations, possible sanctions, when will hearing take or took place, who attended and venue.
 43. The Respondent in its written submissions urged that the Claimant was afforded a fair hearing and reference was made to an email from one Jacob Okumu on 23 April 2012. The said email does not have the body or subject but tags along emails exchanged between Jacob Okumu, Judy Macharia and a Skippy Zippie on 21/23 April 2012 in reference to a different issue, Elsek and Elsek cheques, and from the body of the emails, an explanation was being sought from one Zipporah.
 44. The first attempt by the Respondent to confront the Claimant with *charges* was through email sent after midnight on 5 May 2012. The email sent only an extract of the audit report. The Respondent contends the email sought an explanation from the Claimant. This email did not inform the Claimant that his dismissal was under contemplation. It was sent after midnight on Saturday, a non working day ordinarily. On 7 May 2012, a Monday, the dismissal letter had been prepared. The Claimant clearly was not afforded reasonable opportunity to present his side of the case.
 45. The Respondent's second witness did not share the audit report with the Claimant and he confirmed he did not interview security guards as suggested in the audit report. The records were not produced in Court. On 20 May 2012 and 24 May 2012, the first witness, in response to a request by the Claimant, sent to the Claimant what was said to be the audit report. By this time, the Claimant had been dismissed.
 46. The Respondent did not disclose how, when and who informed the Claimant that his dismissal was under consideration. An employee ought to be informed in clear and unambiguous language of the reasons being considered by an employer to terminate the employment relationship. This requirement applies whether the process adopted is oral or in writing.
 47. In my view, the summary dismissal of the Claimant was not in compliance with the procedural fairness safeguards of section 41 of the Employment Act, 2007 because, the Claimant was not informed that his dismissal was under consideration; was not furnished with the charges to respond to and was not given adequate time to make representations. The dismissal was therefore procedurally unfair.
 48. The Respondent's submission that summary dismissal is exempted from the provisions of section 41 of the Employment Act, 2007 is misplaced in light of the express language of section 41(2) of the Act that

Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.

Substantive fairness

49. Having come to the conclusion that the dismissal was procedurally unfair, it is not necessary for the Court to discuss whether the Respondent has proved the reason(s) for termination and that the reasons were valid and fair reasons as required by sections 43 and 45 of the Employment Act, 2007. But in the circumstances of this case, the Court is of the view the reasons require investigation.

50. The ground given in the termination letter was *gross misconduct* and the reason was *suspicion of committing a criminal offence to the substantial detriment of the Respondent*. The particulars were that an audit had established that the Claimant had delivered resin to 'customers' without documentation.
51. An audit report by Wycliff Basweti dated 3 May 2012 was produced (Resp. exh 2). According to the audit report, the Claimant had sold 20 kgs of resin severally but the same were recorded as having been used in fibre glass production.
52. On 14 May 2012, the second witness stated that he wrote a memo to the Respondent's directors informing them that the records had established that the Claimant had on 30 April 2010, 4 May 2010, 29 May 2010 and 11 June 2010 issued resin to the fibre glass department but the same were not reflected in the records; that on 21 July 2010 and 27 July 2010 while 2 jerry cans of resin had been issued, the records showed only 1 jerry can had been received, and he computed the loss at about Kshs 60,000/-.
53. The witness also got a confession from the Claimant's junior colleague, one Zipporah who wrote an incriminating statement against the Claimant (Zipporah was also dismissed on the basis of the audit report).
54. The Claimant was dismissed through letter dated 7 May 2012. It appears that when the Memo of 14 May 2012 was being written, audit/investigations had not been completed.
55. The Respondent did not produce any primary records from which the audit report was prepared or confront the Claimant with the same. The employee/sales representative (Zipporah) who was allegedly sent by the Claimant to sell resin to the Claimant's 'customers' was not called to testify because she had also been dismissed. She wrote a statement on 2 May 2012. The statement did not give details of the 'customers' to whom the Claimant allegedly sent her.
56. The initial audit report dated 3 May 2012 indicated that the 'customer' could not be traced and that this would await the return of the security officer who raised the allegations from leave to give further details. Another audit report dated 14 May 2012 provided further details, but this report came after the Claimant had been dismissed.
57. Under the circumstances, the dismissal of the Claimant was precipitate and could not have been for valid and fair reason(s). The Respondent dismissed the Claimant before it had established the full facts. The termination was not for a valid or fair reason(s).

Appropriate relief

7 days salary worked in May 2012

58. The Claimant was dismissed vide letter dated 7 May 2012. Pursuant to section 49(1) (b) of the Employment Act, 2007 the Claimant is entitled to the wages earned. The dismissal letter indicated he would be paid wages earned and the Respondent admitted the claim in the sum of Kshs 28,000/- for 7 days and not the 4 days pleaded. The Court would award him the Kshs 28,000/- admitted under this head of relief.

1 month salary in lieu of notice

59. The Court has reached a conclusion the dismissal was unfair. By dint of clause 7 of the appointment letter and sections 35 and 36 of the Employment Act, 2007, the Claimant is entitled to one month pay in lieu of notice he ought to have been given. The Court would award him Kshs 120,000/- under this head.

18 days leave for 2011/2012

60. The Respondent had offered to pay the leave balance. The Claimant has made a case for this relief and is entitled to the Kshs 72,000/- claimed.

Leave travelling allowance

61. The Respondent had in the dismissal letter acknowledged this allowance was payable and

admitted the same in written submissions. The Claimant is entitled to the Kshs 3,150/- as claimed.

Unpaid salary arrears from 1 June 2010 to September 2011

62. The Claimant sought Kshs 840,000/- on account of unpaid salary for the years 2010/2011. The basis of this claim was pleaded as the enhancement of salary to Kshs 70,000/- with effect from 1 June 2010.
63. The Claimant had been promoted/appointed as Acting Internal Auditor through letter dated 10 May 2011. On the same day, he wrote to the Respondent seeking to have his salary reviewed in line with the new responsibilities. On 23 May 2011 the Respondent's directors advised him that his salary had been enhanced to Kshs 70,000/- backdated to 1 June 2010.
64. According to the Respondent's first witness, Allan Bwire Wabomba (Financial Controller) the backdating of the salary to 1 June 2010 was a typing error which it learnt of only when it was served with the suit papers. He further stated that the Claimant never sought the arrears while in employment.
65. The Claimant on his part produced his pay slip for August 2011 which indicated that his salary was Kshs 70,000/-.
66. Remuneration is one of the *essentialia* of an employment contract. Its review upwards or downwards goes to the root of an employment contract.
67. The Claimant did not explain why he never sought the arrears until after he had been dismissed and filed a claim in Court to seek the arrears. The explanation given by the Respondent and the conduct of the Claimant in not seeking an explanation or giving one in Court leads me to find the explanation that there was a typing error plausible.
68. This head of relief therefore fails.

Underpayments from September 2011 to May 2012

69. Under this head, the Claimant sought Kshs 350,000/- as underpayments on the basis that on 13 September 2011, the Respondent reviewed the Claimant's salary upwards to Kshs 120,000/- per month on his appointment as Group Internal Auditor. The Claimant produced his pay slip for September 2011 and it shows that the review was implemented.
70. On 25 October 2011, (Resp. exh 1) one of the Respondent's Directors wrote to the Claimant informing him that his remuneration was being reverted to Kshs 70,000/-. The letter gave the reason for the downwards review to the fact that the Claimant's personal affairs had interfered with the performance of his official duties.
71. The Respondent's witnesses referred severally in oral testimony to the circumstances under which the downward review was carried out and why. The Claimant was not amused with the reduced salary.
72. Meetings were held and on 27 October 2011 the Respondent's Director wrote to the Claimant informing him that the terms already agreed would be reinstated effective 1 November 2011.
73. On 23 November 2011, the Claimant wrote to the Respondent addressing it on various issues. The letter did not address directly the issue of remuneration or the Respondent's letter of 27 October 2011.
74. The letter of 25 October 2011 (Resp. exh 1) leaves no doubt that the review of remuneration downwards was not discussed with the Claimant prior to the decision to reduce the remuneration being made. The Respondent's witnesses in testimony attempted to give explanations such as relocation to/from Tanzania among others.
75. The letter appointing the Claimant as Group Internal Auditor, although explicit that he would be performing audits across the Respondent's group of companies did not make the Claimant's primary location a factor in remuneration.
76. The decision to reduce the remuneration was unilaterally taken by the Respondent. In my view, this is the type of scenario covered by the decision in *Industrial Rubber Products v Gillon* (1977) IRLR 389 EAT. It was held in the case that

a unilateral reduction in the basic rate of pay, even for good reasons and to a relatively small extent, is a material breach of a fundamental element in the contract of employment.

77. The contract between the parties did not provide or reserve to the Respondent the power to unilaterally review the salary downwards. Unilateral changes of remuneration or other express terms of employment contracts, like any other contract, however justifiable on economic or organizational grounds may well be in breach of contract. The Respondent suggested that the Claimant had accepted the revision. But this cannot be correct.
78. The answer to the suggestion is however the letter of 27 October 2011 from the Respondent reinstating the revised terms. The letter leaves no doubt the Respondent, after some communication and consultations with the Personnel department, not disclosed to the Court, reviewed the decision to reduce the Claimant's salary and reverted it to Kshs 120,000/-. No explanation was given by the Respondent as to why the contents of this letter were not implemented.
79. Further, in my view, the correct legal position is that expressed in the comparative and persuasive Canadian decision, *Hill v Peter Gorman Ltd*, (1957) O.J. No. 188, 9 D.L.R. 124 that an employee's decision to continue performing his duties in light of a unilateral variation of a contractual term by an employer does not amount to an employee's acceptance of the unilateral variation, if the employee has signalled his objection to the variation and the employer does not then bring the contract to an end.
80. In my view, the Claimant has satisfied the Court that he was entitled to a salary of Kshs 120,000/- from September 2011 and the Court finds this is the salary he should have earned until termination in May 2012. He was paid Kshs 70,000/- instead of Kshs 120,000/- for 7 months and was thus underpaid by Kshs 350,000/-. This head of relief succeeds.

Compensation for unfair termination

81. This is one of the primary remedies where a finding of unfair termination is made. It is a discretionary remedy. Like all judicial discretions, it must be exercised judiciously. Section 49(4) of the Employment Act, 2007 has listed some 13 factors the Court ought to consider (any, some or all).
82. The Court has reached the conclusion that the dismissal of the Claimant was unfair. He has been awarded pay in lieu of notice. It is not practicable to order reinstatement though the Court was not informed whether the position or a replacement had been recruited. At the time of hearing, the Claimant stated he had ventured into business.
83. Considering the mentioned factors, the Court is of the view that an award equivalent to 4 months gross wages would be just. The same is assessed at Kshs 480,000/-.

Certificate of Service

84. An employee on separation with an employer is entitled to a certificate of service as of right. That is what section 51 of the Employment Act, 2007 provides for.

Costs

85. Costs do not follow the event in the Industrial Court like under the civil courts. The Claimant did not comply with directions as to the filing of submissions, necessitating the postponement of the delivery of this judgment from 11 June 2014 to today, thus impacting on the Court's management of its docket. The Court therefore declines to exercise its discretion to award costs.

Conclusion and Orders

86. From the foregoing, the Court finds and holds that the summary dismissal of the Claimant was unfair and awards him and orders the Respondent to pay him

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|---------------------------------------|----------------|
| a. 7 days worked in May 2012 | Kshs 28,000/- |
| b. One month salary in lieu of Notice | Kshs 120,000/- |
| c. 18 days outstanding leave | Kshs 72,000/- |
| d. Leave travelling allowance | Kshs 3,150/- |

e. Underpayments (Oct 2011-7 May 2012)	Kshs 350,000/-
f. 4 months wages as compensation	Kshs 480,000/-

TOTAL	Kshs 1,053,150/-
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- 87.The claim for unpaid salary arrears for 2010/2011 is dismissed.
- 88.The Respondent to issue the Claimant with a certificate of service.
- 89.There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 18th day of July 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Rakoro instructed by Rakoro & Co. Advocates

For Respondent Mr. Mutuli instructed by Mutuli & Associates Advocates