



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 145 OF 2013**

**PETER C. KAMAU .....CLAIMANT**

**VERSUS**

**GRAIN BULK HANDLERS LTD .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. The claimant suit is contained in the Amended statement of Claim filed on 21/1/2014. It seeks to recover ksh.670,451.07 being accrued employment benefits plus compensation for unfair termination of his employment by the respondent on 27/3/2013.
2. The respondent has denied liability and averred that the claimant was terminated lawfully and fairly in accordance with Section 44 of the Employment Act for his habitual gross misconduct and breach of contract. The case was heard on 28/5/2014 and 2/7/2014 when the claimant testified as CW1 and the respondent called Mr. Joseph Otin as RW1.

**CLAIMANT'S CASE**

3. CW1 was employed by the respondent on 6/4/2009 vide letter dated 4/4/2009 (Exh.1) as Control Room Operator and Waybridge Administrator. His salary was ksh.22,500 with a medical cover, 21 days annual leave and a termination notice of one month.
4. CW1 was confirmed vide letter dated 21/8/2009 making him pensionable and increasing his salary to ksh.26,638.50 which continued till the end of his services.
5. On 3/8/2012 CW1 was on duty at the control room loading trucks in an operation which required at least 2 people. In the process of operating the system alone, there was an overload of truck by 5 tonnes. After the incidence he was asked to record a statement after he was served with a warning letter and the matter ended there.
6. On 19/3/2013, CW1 who suffers from chronic ulcers, fell sick with diarrhea and could not attend work. On 20/2/2013 he did not go to work again because it was his official off duty. CW1 further explained that he reported work on 21/3/2013 but was called to the HR office where he was dispossessed of his employment identity card and kept until 4 pm when he was served with a suspension and show cause letter dated 21/3/2013 requiring him to respond by 2 pm the same day. The suspension was for 14 days without pay.
7. CW1 immediately rushed to buy a piece of paper to write a reply to the show cause letter but when he returned the Security Guards denied him re-entry to the premises for lack of employment identity card. He had no other option but to go home. The show cause letter required CW1 to explain lateness and absence from work but the dates in question were not specified.

8. On 26/3/2013 his sister who works for the respondent informed CW1 that he was supposed to attend disciplinary hearing on the said 26/3/2013. CW1 was not aware of the date because he had no phone at the time. He rushed to the office on 27/3/2013 to verify the position and deliver his reply to the show cause letter. The letter was received by the HR Manager who read it and then snatched CW1's phone and gave it to the administrator to charge it and transfer the SMS messages from CW1's phone to the HR's phone. The HR Manager told CW1 to go and return the following day 28/3/2013.
9. CW1 returned on 28/3/2013 as directed by the HR Manager only to be served with a summary dismissal letter dated 27/3/2013. The reasons for dismissal were firstly failure to respond to the Show Cause letter as required and secondly, failure to attend the disciplinary hearing despite notice and reminder through SMS. No dues were paid to CW1 even after serving a demand letter through his lawyer. CW1 denied ever receiving any invitation to attend the alleged disciplinary hearing.
10. On cross examination by the defence counsel, CW1 admitted that he had taken 2.5 excess leave days in 2012 but he maintained that he had also earned 3 leave days from January to March 2013 on prorata basis. He admitted that he never availed a medical document from the doctor who treated him on 19/3/2013 when he allegedly fell sick and absented himself. He explained that on 20/2/2013 he was on his official off duty according to the Supervisor's time table.
11. CW1 confirmed that the show cause letter charged him with habitual late reporting to work without any explanation. He confirmed further that his shifts started either at 7am, 3pm or 11pm. He admitted that on 15<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 28<sup>th</sup>, and 30<sup>th</sup> January 2013 he reported to work late by between 11 and 34 minutes. He explained that the lateness was not perpetual but occasional due to the traffic jam at Kibarani area. As regards the overloading of the truck, CW1 explained that he was told to work alone because people were on leave.
12. CW1 denied ever receiving any invitation for a disciplinary hearing. On 26/3/2013, he returned to his house in the evening and found that his sister had left a note asking him to see her urgently. CW1 went to see her at 8pm on 26/3/2013 and she asked him whether he attended his disciplinary hearing. CW1 then went to see the HR Manager the following day 27/3/2013 and after his phone was activated he saw messages from HR personnel and CW1's sister asking why he was not picking calls. According to CW1, he gave defence to all the charges in show cause letter in his reply dated 27/3/2013.
13. On re-examination CW1 denied that his sister served letter inviting him to disciplinary hearing. He maintained that the time he saw the SMS in his phone was on 27/3/2013 morning when his phone was activated.

## **DEFENCE CASE**

14. RW1 is the HR manager for the respondent since 2011. He confirmed that CW1 was Operations Assistant attached to the control room but he was summarily dismissed on 27/3/2013. His gross salary was Ksh.26,638.50 .
15. The reasons for dismissal were firstly, failure to respond to show cause letter and secondly failure to appear before disciplinary committee meeting. According to RW1, the claimant was aware of the disciplinary hearing. CW1 had a previous disciplinary case on 21/8/2012 which ended with a warning letter for negligent performance of duty.
16. Thereafter CW1 developed persistent absenteeism and late coming according to clock in print out produced as defence exhibit d. 5. The said record indicated that on 15<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> January 2013 CW1 arrived for work late by between 11 and 34 minutes. The said lateness inconvenienced other workers and increased costs in terms of overtime pay for the officer waiting to be relieved.
17. After the suspension of the CW1, RW1 wrote a letter dated 25/3/2013 inviting CW1 to a disciplinary hearing but he could not reach CW1 by phone, possibly to ask him to come for the letter. RW1, then sent CW1's sister who works for the respondent to deliver the letter dated 25/3/2013 to CW1. She confirmed that she left the letter at CW1's place but CW1 never attended the hearing. The hearing then proceeded in CW1's absence after which the committee recommended that CW1 be given another chance to appear and defend himself.
18. On 27/3/2013, CW1 came to RW1's office and delivered a letter explaining why he never attended

- the hearing. RW1 explained that CW1 denied that he had received any SMS. When CW1 switched on his Phone RW1 confirmed that CW1 had received the SMS inviting him for the hearing. CW1 forwarded the SMS to RW1's phone and he printed them (exh.d.8(a) & (b) ) The SMS had been send by CW1's sister.
19. According to RW1 the dismissal was fair because CW1 was afforded a chance to defend himself. He denied that CW1 was denied entry by the security officers while returning to deliver a reply to show cause letter. RW1 stated that CW1 was paid salary for the whole month of March 2013 although he did not work the whole month. He produced a copy of bank transfer (Exh.d.9) in favour of the claimant for ksh.14291 being salary for March 2013. He contended that CW1 had taken excess 2.5. leave days vide leave application from dated 13/11/2012. RW1 further contended that CW1 was not entitled to notice because the dismissal was summary. He also contended that no damages were payable for unfair termination because the dismissal was fair and done through due process.
  20. On cross-examination by the claimant's counsel, RW1 explained that CW1 was dismissed for reporting to work late and for being absent on 20/2/2013 and 19/3/2013. He however admitted that the clock-in record showed that CW1 also used to arrive earlier or check out later than the scheduled time. RW1 admitted that the letter inviting CW1 for disciplinary hearing was served on CW1 personally. RW1 further admitted that the suspension for CW1 was for 14 days and he was not to attend disciplinary hearing within the 14 days suspension period. The hearing however was on 26/3/2013 and the chairman of the committee instructed RW1 to write to the CW1 to update him on the committees hearing. According to RW1 the hearing was to be reconvened after the lapse of the suspension period.
  21. RW1 however never wrote to the CW1 as instructed because CW1 came to his office on 27/3/2013 bringing a reply to the show cause letter. RW1 confirmed that CW1's phone was off when he came to see him on 27/3/2013 but when RW1 switched on CW1's phone he saw the SMS, one of which was by CW1's sister saying that she had left the letter on the chair.
  22. RW1 clarified that the dismissal of the claimant according to the dismissal letter included failure to attend disciplinary hearing. RW1 admitted that respondent has an HR Manual which is given to every employee upon appointment. According to RW1, CW1 was dismissed before the suspension period had lapsed.
  23. On reexamination RW1 contended that the CW1's reply to show cause admitted late reporting but blamed it on traffic jam.
  24. After the close of the hearing the parties filed written submissions.

## **ANALYSIS AND DETERMINATION**

25. The court has carefully perused and considered the pleadings, evidence and the written submissions filed. It is not in dispute that CW1 was employed by the respondent as operations Assistant at a gross salary of ksh.26,638.50. It is also not in dispute that CW1 was suspended from work for 14 days without pay on 21/3/2013 at 4pm with instructions to respond at 2pm the same day. It is also not in dispute that CW1's employment identity card was repossessed on 21/3/2013 after suspension and no other letter was served or any telephone correspondences received by him from the respondent until 27/3/2013 when he went to see RW1 to deliver his reply to the show cause letter and confirm whether indeed a hearing was done for his case as notified by his sister on 26/3/2013 at 8pm. It is also not in dispute that his phone was off due to lack of charge as at the time he went to the office on 27/3/2013. It is also common knowledge that the dismissal of the claimant and the alleged hearing of his case was done before the lapse of his suspension period of 14 days when the hearing was not supposed to be done according to RW1.

The issues for determination however are:

- a. **Whether the dismissal of the claimant was unfair.**
- b. **Whether the relief sought ought to issue.**

## **Unfair Dismissal**

26. Under Section 45 of the Employment Act, termination of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and further that it was reached after following a fair procedure. In the present case the reason for dismissal was failure to respond to show cause letter dated 21/3/2013 and failure to attend disciplinary hearing on 26/3/2013.
27. It is true from the record that CW1 did not reply to the show cause letter on 21/3/2013 by 2pm as requested. The reason given by CW1 for his failure to beat the deadline was that the letter was served on him on 21/3/2013 at 4pm which was 2 hours after the deadline. Even after CW1 rushed out to buy a paper to reply, he was denied re-entry to the office by the security guards because after the suspension he was dispossessed of his employee's identity card. The foregoing evidence has not been contested by the defence. RW1 did not prove that he served the CW1 with the show cause letter before 2pm on 21/3/2013. He did not produce any delivery book or anything else to prove that CW1 was served before 2pm. Likewise the defence never called the security officers on duty on 21/3/2013 to deny that CW1 was not denied entry for lack of employee's card on that day evening after he rushed to buy a paper to respond to the show cause letter.
28. As regards the failure to attend disciplinary hearing, the defence did not prove that the invitation letter dated 25/3/2013 was served on the CW1. Indeed RW1 admitted that CW1 was not served personally with the letter. The question that arises is why did the disciplinary case proceed ex parte when there was no proof of service of the letter on the person of CW1?. This court is satisfied on a balance of probability that the reasons cited for the dismissal of the claimant were not valid. They were also not fair reasons considering the contribution by the respondent to the default. Firstly the show cause letter was served after the deadline set for the claimant to respond. Secondly the hearing was convened before effecting service of the invitation letter in the claimant. Even if the claimant was served, which is not true, the period given between 25/3/2013 after 5pm when CW1's sister was to serve him after work and the hearing date on 26/3/2012 was unreasonably short. The court is therefore suspicious that RW1 was acting in bad faith in the two incidences of service of correspondences to the CW1.
29. Although the court was not called upon to determine whether CW1's constitutional right to privacy was breached by RW1, the court is of the view that, in desperate attempt to cover up his failure to serve the CW1 with the letter dated 25/3/2013, RW1 resorted to unconstitutional and unconventional methods of investigating whether CW1 was aware of the hearing date of his disciplinary case. In that regard any evidence allegedly obtained through the unlawful access to the claimant's phone messages is not admitted for being an illegality if not unfair labour practice.
30. In addition to the said substantive unfairness, the court finds that the procedure followed to dismiss the CW1 was unfair. As already observed above, the show cause letter came after the time set as the deadline for CW1's response. Secondly CW1 was never served with invitation letter to attend the hearing when the committee adjourned the hearing to invite CW1 for hearing. RW1 admitted that he did not invite him or constitute the committee for the hearing. Instead, CW1 was told to go home after delivering his reply to the show cause letter on 27/3/2013 and a dismissal letter was done the same day.
31. The said dismissal was in breach of Section 41 of the Employment Act which requires that before dismissing an employee for misconduct or poor performance of duty under Section 44 of the Act, the employer must accord the employee a hearing in a language he understands and in the company of a person of the employee's choice. That was not done in this case and consequently the dismissal of CW1 became unfair under Section 45 of the said Act.

## **Reliefs**

32. Under Section 49 of the Employment Act an unfairly terminated employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. In this case CW1 is awarded ksh.26,638.50 being one month salary in lieu of notice. The prayer for salary for March 2013 is dismissed in view of the defence case that CW1 was paid the salary for while month as per Exh d.2 and d.9. The prayer for 3 leave days not taken is also not granted because CW1 had taken excess leave by 2 ½ day in 2012.
33. The claim for 12 months salary for wrongful dismissal is dismissed as the same is covered by salary in lieu of notice. CW1 is however awarded 6 months salary as compensation for unfair termination. The reason for not awarding the maximum compensation is that CW1

was guilty of reporting to work late. Had the employer followed the law in disciplining the claimant, she had valid and fair reason for dismissing CW1 under Section 44 of the Employment Act read with Section 41 of the said Act.

**DISPOSITION**

34. For the reasons stated above, judgment is entered for the claimant for ksh.186, 469.50 plus costs and interest.

**Dated, signed and delivered this 26<sup>th</sup> September 2014.**

**O. N. Makau**

**Judge**