



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 117 OF 2013

BETWEEN

THOMAS SILA NZIVOCLAIMANT

VERSUS

BAMBURI CEMENT LIMITEDRESPONDENT

Rika J [Decision]

CA. Mr. Kombe

Radido J [Trial]

CA. Ms. Midian

Mr. Oddiaga instructed by Stephen Odiaga & Company Advocates for the Claimant

Mr. Njeru instructed by Njeru & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. This dispute was heard before Justice Stephen Radido who has since been transferred to Nakuru, before he could write and deliver his decision. It was directed on 13th October 2014 that the incoming Judge, the

undersigned, proceeds to write and deliver the decision.

2. The Claimant filed his Statement of Claim on 20th May 2013 and Amended Statement of Claim on 7th October 2013. The Respondent filed its Response on 23rd September 2013. Both Parties subsequently filed Bundles of Documents. The Parties gave their respective evidence and closed their cases on 17th June 2014. The Claimant gave his evidence on this date, as did the Respondent's Human Resources Manager Mrs. Rose Kebati Ssali. The Claimant filed his Closing Arguments on 22nd July 2014, while the Respondent did so on 14th August 2014.

The Claim

3. The Claimant states he was employed by the Respondent Company, on 1st February 2003. He was summarily dismissed by the Respondent on 2nd November 2012. At the time of dismissal, he worked in the position of Production Assistant earning Kshs. 110,932 per month.

4. He faults the Respondent's decision, alleging the complaint against him was a nullity; it was not proved; and the entire process was a sham. He appealed against the initial decision. The appeal process was itself a sham. He holds the decision by his former Employer was unlawful and unfair, and seeks the following orders from the Court:

- a. A declaration that the Respondent's decision was not based on the evidence before it;
- b. A declaration that there was no evidence before the Committee to form the basis for dismissal;
- c. A declaration that the entire disciplinary process was null and void;
- d. An order to be made that the Respondent compensates the Claimant for wrongful dismissal;
- e. The Court makes any order for interim payment as it deems fit to make in the circumstances;
- f. Alternatively the Court makes an order for the Respondent to reinstate the Claimant;
- g. An order that the Respondent releases all the Claimant's dues comprising damages for wrongful dismissal; bonus pay for 2012 at Kshs. 142,000; meal allowance at Kshs. 480; accrued annual leave at 57.38 days of Kshs. 289,331; 2 days worked in November 2012 at Kshs. 10,852; 10 days worked in October 2012 at Kshs. 54,260; gratuity under collective bargaining agreement for 10 years at Kshs. 2,773,300; notice pay; costs; and interest.

5. In his testimony the Claimant told the Court he worked for the Respondent for 5 years. He was appointed as the Supervisor in 2007 and Production Assistant from 2011. He was a Member of the Union from 2003. In October 2012, the Respondent claimed to have lost 13,500 litres of Industrial Diesel Oil [IDO]. The Claimant was alleged to have received this oil on 12th September 2012. He was suspended in a letter dated 4th October 2012, to allow for investigations. He was issued a second letter of suspension dated 22nd October 2012.

6. He was called to a disciplinary hearing. He was heard. The Respondent then made a decision to summarily dismiss the Claimant, communicating its decision in a letter dated 2nd November 2012, titled 'Confirmation of Summary Dismissal.' He made an appeal against this decision on 20th February 2013. The appeal was rejected.

7. 3 reasons were given by the Respondent in the letter of summary dismissal as justification for the decision. These were:

- The Claimant indicated he received 13,500 litres of Industrial Diesel Oil [IDO] on 12th September 2012, yet this IDO was not available in the Respondent's physical stock.
- The Claimant committed a safety violation as he knowingly allowed an unauthorized person as a passenger in a Supplier's Truck against the Safety Rules.
- The Claimant's statements on the events of the material day did not agree with statements given by his witnesses, which showed the Claimant to lack in honesty.

8. The IDO was being brought by Total Kenya Limited. The Truck would approach the gate. Outsourced Security Guards would inspect it. The Truck would then proceed to the weighbridge in the Factory. It was weighed by 2 different groups. The Truck would be cleared then proceed to the Factory ready to empty the Oil. When it reached the Claimant in the Factory, he would check its documents and check the contents with a dipstick after breaking the seals. He did this in the presence of the Security Guard. The Truck would then proceed to the quarry where it emptied the Oil in a Tank.

9. The reverse process would have the Claimant sign the documents for Total Kenya Limited, indicating Oil delivery. The Truck would be released and go through the weighbridge while empty. Weighing would be done by a different team and the Truck released. It was not possible it returns with Oil, as there were many checks to ensure delivery.

10. This was the Claimant's role. He did not have any other duties. It was not the Claimant's duty to check if the Truck had unauthorized passenger. It was not possible for unauthorized persons to gain entry to the Factory, without a valid gate pass from the Security Guards. The Oil was used at the quarry and consumption was recorded.

11. Recording was done through a system called ABB. It is shown in the Daily Production Report attached to the Statement of Claim, that 13,500 litres of Oil was received at the quarry. From 12th September 2012, the Crusher crushed 74177 tonnes of stones using the Oil. No other Oil was received during this period. The Respondent had these records when it made a decision to suspend and summarily dismiss the Claimant.

12. The Claimant was not paid his dues after dismissal except for the pension. He was a Member of the Trade Union. He did not sign any document recanting Union Membership. The Respondent did not send the Claimant any letter removing him from the Union. He was a Member for 10 years. Gratuity was payable at the rate of 2 ½ months' salary for every completed year of service. He claims Kshs. 2,773, 300 as gratuity. He seeks the prayers listed in the Statement of Claim.

13. He maintained on cross-examination that he was a Member of the Trade Union, having joined in 2003, up to the year 2012 when he was summarily dismissed. He did not inform the Trade Union about the case. The Union did not offer to take up the case in Court. He was not represented by the Trade Union during the disciplinary hearing. He was not accompanied by a Workmate. His pay slip for April 2012 did not show any deduction made from his pay as Trade Union dues.

14. He was paid pension on dismissal. It is paid to Non-Unionisable Employees. He was informed about the loss of 13, 500 litres of fuel. He was not told that Auditors carried out an exercise on the delivery. He received the letter dated 16th October 2012 from the Respondent, notifying him of charges against him, and of the disciplinary hearing. It alleged Oil was fictitiously received, but not available in the physical stocks. He participated in the disciplinary hearing and was represented by a Colleague. A decision was made to summarily dismiss him. He was granted an opportunity to appeal. He appealed and was granted a hearing on appeal.

15. It was his duty to receive the Oil. It was not his duty to control people entering the Factory. In 2012, he held the trophy for safety. Nobody could access the Factory without a pass. The unauthorized passenger was a Turnboy. The Claimant had no responsibility with regard to access by unauthorized persons. He had an input in the Oil records. The user department would enter the data. The Claimant did not maintain record; he used the records maintained by others. He prays the Court to allow his Claim.

The Response

16. The Respondent agrees the Claimant was its Employee. He was issued suspension letter on 4th October 2012, and second letter of 22nd October 2012. His salary was Kshs. 110,932 per month. He was summarily dismissed in accordance with the law.

17. On 12th September 2012, the Claimant received 13,500 litres of Industrial Diesel Oil on behalf of the Respondent. He allowed unauthorized person to be ferried in the Supplier's Truck, contrary to the safety policy which it was his duty to enforce. Although he received the 13,500 litres, it was later found to be unavailable in the Respondent's physical stock.

18. Investigations carried out by the Respondent revealed the Claimant could not account for the Oil. He allowed unauthorized persons into the Factory. He failed to carry out his duty in a careful and proper manner as required and colluded with unknown persons to steal 13,500 litres of Oil.

19. He was advised by the Respondent in writing to attend a disciplinary hearing. He was informed of the charges against him; provided with documentation in support of the charges; advised he could bring his own witnesses for the hearing; informed the Respondent had documents it intended to rely on, which could be availed to the Claimant on request; appraised of the procedure to be followed at the hearing; told of the possible sanctions to be imposed in event of an adverse finding; advised of his right to be accompanied by a workmate during the hearing; and given an opportunity to make request for clarification or assistance from the Respondent in case of special needs. At the actual hearing, all his procedural rights were observed.

20. He was invited by the Respondent after the hearing, to a meeting to discuss the outcome of the hearing and the disciplinary sanction the Respondent considered against him. He was informed in the meeting of 1st November 2012 that the Respondent had resolved to summarily dismiss him for gross misconduct. The letter of summary dismissal of 2nd November 2012 outlined the facts constituting gross misconduct; the consequences of the Claimant's action on the Respondent; the benefits due to the Claimant; and the procedure for appeal. He appealed, was heard, and appeal rejected. He cannot be reinstated having occasioned the Respondent loss. He was treated fairly and lawfully. He was dismissed in accordance with the law and staff instructions; received a fair hearing in accordance with the rules of natural justice; and was paid what was due to him.

21. Rose Kebati Ssali, Respondent's Human Resources Manager told the Court she handles disciplinary cases. She was involved in the Claimant's case from the beginning. At the time of summary dismissal, the Claimant was not in the Union. He was assigned the duty of receiving Industrial Diesel Oil, check the documents and the contents, and release the Truck after delivery. The Oil was stored in a Fuel Tank.

22. On 12th September 2012, the Oil was apparently received and the Truck released. The Control Team made a physical check as part of routine duties; they found 13,500 litres of Oil alleged to have been received, was not physically available. The Team reported no Oil had been received. The Team examined the records from September 2012; there was no consumption, which indicated the Oil was not received. Operations could continue without the Industrial Oil

23. A disciplinary hearing against the Claimant followed. He attended in the company of a fellow Employee. He was fairly heard, and the proceedings recorded as captured in the minutes filed in Court by the Respondent. He was taken through all the charges and required to answer.

24. The Claimant must have acted in collusion with other Employees. He was generating reports. He generated the Production Reports attached to his Claim, indicating receipt and use of the 13,500 litres of Oil. It is possible the information was fictitious. He generated the reports on the crushing of stones and consumption of fuel, which he has asked the Court to rely on.

25. He was dismissed because he was in charge of receiving Oil and the physical stock revealed there was no Oil. The Oil was delivered by Total Kenya Limited. Ssali learnt the Total Driver was dismissed. The Claimant committed a safety violation. He allowed a Turnboy who was not wearing proper protective gear, into the premises. The Claimant should have taken responsibility to ensure he was working with the right people.

26. The Claimant was granted the opportunity to appeal. He appealed, was heard and appeal rejected. The reasons for summary dismissal were restated in the letter.

27. Ssali emphasized on cross-examination that the Claimant was not in the Trade Union on the date he was dismissed. He was entitled to payments-gratuity while he was a Union Member, and to pension as part of the Management Staff. Gratuity was retained by the Respondent. It was calculated based on his salary at the relevant period and the completed years in of service. It was transferred to his Pension Scheme with his authority. Kshs. 204,855 was transferred to the Scheme.

28. The Witness testified she could avail details of the salary earned by the Claimant at the time gratuity was computed. Gratuity was anchored in the CBA.

29. On delivery of Oil, the Truck would go through a weighbridge. Security Staff and Marshalls were at the weighbridge. They verified the documents before the Truck was allowed in. A ticket was issued at the weighbridge. The ticket had the registration of the vehicle; the weight of the vehicle; and the product carried. It was issued to the Driver, and entered in the Respondent's computer system. The Driver would give the ticket to the Production Assistant, at the time a role played by the Claimant. The Production Assistant, accompanied by a Security Guard, would do a physical verification before the Oil was emptied. The ticket was returned at the weighbridge and retained by the Respondent. The ticket was not availed to the Court. The Claimant did not generate the ticket at the weighbridge

30. There was confirmation the Truck left the Factory empty.

31. The weighbridge is under Logistics Department, and is manned by the weighbridge Clerk. There were 11 Employees at the weighbridge employed by the Respondent, while 5 Employees were contracted.

32. The Witness testified that it was recommended action be taken against all the involved Employees of the Respondent.

33. The Claimant has not received his dues from the Respondent. Ssali did not have record of the final dues. He is not entitled to bonus pay because he was summarily dismissed. It was in the Respondent's policy not to pay bonus to Employees who were summarily dismissed.

34. The Respondent's Controller communicated with Total Kenya Limited over the transaction. Ssali testified she thought the Respondent paid to Total Kenya for the 13,500 litres of Oil. It is possible the Respondent complained to Total Kenya over the incident. She did not have the records for fuel stocks before 12th September 2012. The Turnboy was allowed in by the Security Guards and the Marshalls. They should not have allowed him in. The Claimant engaged the Turnboy. Bonus is paid to reward good performance; it is not paid to Employees who are summarily dismissed.

35. Redirected, the Witness told the Court the Claimant was receiving monthly pension after dismissal and would also receive a lump sum. It was not possible to be paid pension and gratuity concurrently. Gratuity could only be paid after the Claimant signed. He did so, and it was transferred to his Pension Scheme. He generated the daily production report. He was dismissed because what he received was not available from the physical stock. Ssali recommended action against other Employees. The Respondent urges the Court to dismiss the Claim with costs.

Submissions

36. The Claimant submits he understood the Respondent to have conceded to some of his claims including meal allowance; accrued leave; 2 days worked in November 2012; and 10 days' worked in October 2012. Suspension was in violation of Staff Standing Instructions. There was no provision for suspension pending investigations, followed by suspension. This offended Rule 4.1 of the Employees' Handbook on fairness and natural justice. There was no Complainant in the disciplinary hearing. No Witnesses were called. The Committee acted as the Complainant, Prosecutor and Judge. The Claimant produced records showing fuel was received. He was not contradicted by the Respondent. No Industrial Diesel Oil was lost and the entire disciplinary process was a witch-hunt. The Claimant was entitled to gratuity based on the CBA. The calculation of gratuity on transfer to the Pension Scheme was erroneous. The bonus policy of the Respondent is against natural justice. The Claimant relies on the **Kenya CA**

Number 25A of 2013 between Kibe v. Telkom Kenya Limited [2014] e-KLR in arguing that he is entitled to costs; and **Kenya Industrial Court Cause Number 50 of 2012 between Mwendwa v. Anidan [K]**. It is not clear the latter decision is cited in arguing which aspect of the Claimant's Case.

37. The Respondent submits the measure of summary dismissal was available to the Respondent under Section 44 [1] and [4] of the Employment Act 2007 and the Employees' Handbook page 32. It was realized Oil was received on 12th September 2012, but was not available as confirmed by a physical audit. The Claimant was suspended in accordance with page 31 of the Employees' Handbook. The incident was investigated, the Claimant charged and heard; a decision was made against him; he appealed; and the appeal was dismissed. Summary dismissal was fair and justified. The Respondent relies on 2 decisions of **the Industrial Court at Mombasa Cause Number 105 of 2012 between KUDHEIHA v. Pwani University College**; and **Cause Number 1050 of 2011 between Loice Otieno v. KCB**, both which addressed lawfulness and fairness in employment termination. The Claimant is not entitled to bonus payment under the Respondent's Policy. He is not entitled to compensation for unfair termination or damages for wrongful termination.

38. The Respondent further submits the Claimant is entitled to 57.38 days of annual leave at Kshs. 289,331.

39. He is not entitled to meal allowance as he was under suspension during the relevant period. He is likewise disentitled to salary of 2 days in October 2012, and 10 days in October 2012 because he was on suspension. Gratuity is not payable as sought. The Claimant's gratuity was transferred to his Pension Scheme after he joined Management. He continues to receive pension and would not merit gratuity which is availed to Union Members. There was no privity of contract between the Claimant and the Trade Union with respect to the CBA. The Respondent **cited Kenya CA Appeal Number 86 of 2006 between Van Leer East Africa Limited v. Mjidho** and **Kenya H.C.C.A Number 104 of 2000 between Kogo v. Kenya Flourspar Company Limited** in support of this proposition.

The Court Finds and Awards:-

39. The Respondent does not deny the Claimant was its Employee. It is conceded the contract of employment was terminated by the Respondent through summary dismissal of the Claimant. There is no dispute on the salary payable to the Claimant as of the date of dismissal. **The claim for annual leave of 57.38 days is conceded by the Respondent, and allowed by the Court, at Kshs. 289,331.**

40. The prayers for meal allowance, October salary of 10 days and November Salary of 2 days are allowed at Kshs. 480, Kshs. 54,260, and Kshs. 10,852 respectively.

41. The Respondent explained that these payments were with-held from the Claimant because he was under suspension during the period. This was allowed under Clause 4.3 [c] of the Respondent's Employees' Handbook. It states:

“ Suspension without pay: issued on serious offence that may lead to dismissal after completion of investigation. Acts as a warning of the effect of losing job and as reminder to the Employee that he would lose his job if he continued being indisciplined.”

42. The **Kenya Industrial Court in Cause Number 1149 of 2011 between Peterson Ndung'u & 5 Others v. KP&L Company Limited [2014]** the Court explained why such a policy or warning and reminder, practiced by the Respondent, has no place in the modern employment relationship.

43. Relying on its Staff Regulations and Procedures, the KP&L Company in the above Cause had declined to pay its suspended Employees salaries due in the 2 months of suspension. The Court found this policy and practice to have no foundation in the Employment Act 2007.

44. Section 18 [4] of the Employment Act 2007 demands that even in cases of summary dismissal, the Employee shall be paid all the monies, allowances and benefits, due to him up to the date of dismissal.

45. There are limited occasions when the Employer is allowed to withhold the salary of its Employee. Section 18[6] states: “ *no wages shall be payable in respect of a period during which the Employee is detained in custody or serving a sentence imposed under any law.*”

46. Section 80 of the Labour Relations Act 2007 states that an Employee who takes part in, calls, instigates, or incites others to take part in a strike that is not in compliance with the Act, is deemed to have breached the contract, “*and is not entitled to any payment or any other benefit under the Employment Act, during the period the Employee participates in the strike.*”

47. Section 19 of the Employment Act outlines 9 occasions when the Employer may deduct from the wages of an Employee. No provision under this law allows the Employer to deny a suspended Employee his monthly salary as “*a warning of the effect of losing his job and as a reminder to the Employee that he would lose his job if he continued being disciplined.*” Withholding of an Employee’s salary cannot be a disciplinary sanction. The salary remains protected under Part IV of the Employment Act, even during suspension. The contract of employment is still in force. The suspension without pay, offended the principles of Fair Labour Practices and Protection of Wages.

48. The Claimant is entitled to the salary and allowances for the duration he was under suspension. To uphold the Respondent’s decision in withholding these would mean that the Claimant is punished twice, over the same employment wrong.

49. The claim for bonus pay for the year ended 2012 for Kshs. 142,000 has no merit and is declined. Bonus pay is performance based. It is a variable incentive. The Respondent had in place a Bonus Plan. It was aimed at rewarding superior performance. The Claimant did not persuade the Court in his evidence how he came up with the bonus claim of Kshs, 142,000, what provision of the Bonus Plan this claim is hinged on, and seems to have ignored the clause on termination/ dismissal in the Bonus Plan. He was dismissed in November 2012, and going by Bonus Rules, he was not entitled to bonus payment.

50. Collective Bargaining Agreements, contrary to the Decisions relied upon by the Respondent from the Civil Courts, do not only benefit the Members of the relevant Trade Union. The doctrine of privity of contract is subject to various exceptions in the labour law regime.

51. Under Section 57[1] of the Labour Relations Act, CBAs set out the terms and conditions of service of all unionisable Employees at the workplace, covered by the Recognition Agreement. Such Employees need not be Members [i.e. unionized]; they only need to be unionisable [i.e. eligible to join the Union].

52. Under Section 49[1] of the Labour Relations Act the Minister may issue an order requiring each unionisable Employee covered by the CBA who is not a Member of the Union, to pay agency fees to the Union. The law recognized that CBAs coverage goes beyond Trade Union Membership. The rationale in this is to save Employees and Employers the resources that would go into having multiple negotiations for different Employees in a single workplace. The agency fee also ensures the Trade Union is able to recoup the resources spent in collective bargaining and negotiations, and ensures there are no free riders.

53. Section 49 [5] of the Labour Relations Act provides that even when an Employee who is covered by a CBA resigns from the Trade Union, he immediately becomes liable to have agency fees deducted from his wages. Membership or lack of it is not the definitive factor in the application of the CBA.

54. In ***the Industrial Court of Kenya Cause Number 109 of 2010 between Transport & Allied Workers Union v. Societe Internationale De Telecommunications Aeronatique [SITA] [2011] e-KLR***, the question arose on the application of a CBA to a Regional Manager.

55. The Court found that the line between Management and Unionisable Staff remains as drawn in the Industrial Relations Charter. Executive Chairpersons, Managing Directors, Departmental Heads, Branch Managers and Other Persons in charge of operations, having decisional authority and whose responsibilities are confidential in nature, are not unionisable.

56. These Managers perform interpersonal, decisional and informational roles. They are figureheads, leaders and liaison officers at interpersonal level, with social and legal duties. As decision makers, they are entrepreneurs, disturbance handlers and allocators of resources, who also represent their Employers in all negotiations. In the informational role, they act as the nerve centre of the Enterprise, monitoring and disseminating information to subordinates.

57. Although not barred from exercising their freedom of association by belonging to Trade Unions under the Constitution of Kenya, their unionization would result in conflict of interest, disable collective bargaining and confuse the assessment of collective bargaining unit strengths for purposes of recognition. It would not make sense to have Managers sit on the same side with Trade Union Leaders at the collective bargaining forum. It would create disability in the industry if the captains of the industry joined unionisable ranks in industrial actions.

58. The CBA however, is not restricted to the Members of the Union in its scope of application as seen above. It may also be adopted in whole or part by Managers and their Employers, in determining the terms and conditions of service of the Managers. In *TAWU v. SITA* the Regional Manager and the Employer [French in origin], did in fact adopt the CBA concluded between the Employer and the Union, to regulate the terms and conditions of employment of the Regional Manager. He needed not be a Member; the Parties agreed to incorporate the CBA in the individual contract of the Manager.

59. The Claimant worked as a unionisable Employee between 2003 and 2007. He joined management in 2007. The letter appointing him to the position of Packing Shift Supervisor is dated 27th March 2007. It clearly informed the Claimant his new position was in Management [Non- Union].

60. He was eligible for, and joined the Respondent's Pension Scheme with effect from 1st July 2007. The Parties did not agree anywhere that the Claimant would continue to be covered by the CBA.

61. His gratuity under the CBA was computed and transferred to his Account in the Pension Scheme. He confirmed the transfer of gratuity to Bamburi Cement Staff Retirement Pension Scheme, and signed Acceptance of Transfer. He by doing so accepted he was no longer covered under the CBA.

62. It is not proper that he now seeks gratuity for the entire period of service of 10 years, while he is entitled to Pension. The Court would be placing in his hands double social security benefit, which is against the law. Section 35 [6] does not contemplate the payment of multiple social security benefits to Employees. The Claimant ceased his relationship with the Trade Union in 2007. He joined Management and remitted neither Trade Union Dues for continued Membership, nor Agency Fees, to continue benefiting from the CBA. The claim for gratuity payment of Kshs. 2,773,300 is rejected.

63. The last question is whether the Claimant was unfairly dismissed and entitled to compensation. He pleads wrongful termination, but gave evidence and submitted on unfair termination. The Court understood him to be saying he was summarily dismissed without fair and valid reason or reasons, and the decision was arrived at unfairly.

64. He was the Production Assistant. From the Records availed by the Parties, his role entailed among other things, the documentation and inspection of the Trucks from Total Kenya Limited, which delivered Industrial Diesel Oil [IDO] to the Respondent's Factory. The Claimant received 13,500 litres of this fuel on 12th September 2012. According to the Respondent a physical audit carried out by the Respondent's Control Team, discovered this fuel was not available in the physical stock.

65. The Claimant relied on the Daily Production Report to show that the 13,500 litres of fuel were indeed consumed in crushing stones.

66. The Court upon evaluation of the disciplinary proceedings is satisfied that the Respondent had a valid reason in summarily dismissing the Claimant. The Daily Production Lists were generated by the Claimant. The Claimant was not able to explain why he would receive 13,500 litres of fuel, and a physical audit carried out shortly thereafter, failed to yield any such fuel.

67. The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the Employment Act 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no Oil was available even as the Claimant protested he received such Oil, the Claimant's role in receiving the Oil and releasing the delivering Truck, all gave the Respondent reasonable and sufficient grounds to act against the Claimant. Alternative to Section 44 [4] [g], the Respondent may still have found justification in making the decision against the Claimant, under Section 44 [4] [c].

68. The entry of the Turnboy into the Factory was a violation against the Respondent's internal controls, but there was little evidence to link the Claimant to this violation. He did not man the gate, and was not shown to be in supervisory role, to those who manned the gate and issued passes.

69. Summary dismissal was nonetheless substantively justifiable as seen in paragraph 67 above, and therefore valid and fair under Section 45 of the Employment Act 2007.

70. In terms of procedural fairness, the Claimant can have no justification in alleging the Respondent fell short of the minimum statutory standards. The procedure was in full conformity to Section 41 of the Employment Act 2007.

71. The Respondent investigated the incident; communicated the charges to the Claimant; gave him the opportunity to prepare and answer to these charges; he was advised of his right to be accompanied by a colleague; he exercised that right; he was heard; a decision was made; he was advised of his right of appeal; he appealed and appeared before the appellate panel and was heard; and finally a reasoned decision was communicated to him.

72. The Respondent followed its Employees' Handbook, the Employment Act 2007 and the Rules of Natural Justice in handling the Claimant. The proceedings were recorded. The Respondent is to be commended for its scrupulous adherence to the minimum statutory standards in termination of employment. If all Employers borrowed a leaf from the Bamburi Cement Company, it would make the work of the Industrial Court very simple. This Court has looked at the Record keenly, and is unable to fault the Respondent either on substantive justification or procedural fairness.

73. The Claimant resorted to general criticisms of the procedure in his submissions. He submits that there was no complainant; the Respondent was not trying a criminal case, but prosecuting a disciplinary case. He claims that the Committee acted as the complainant, prosecutor and judge. This again was a general criticism which seems to confuse disciplinary proceedings at the employment place, with public Court Trials or the Quasi Judicial hearings of Administrative Tribunals. Disciplinary proceedings at the employment place are not an exact fit of these other proceedings. The Employer invariably is the complainant, and is has the responsibility to investigate, hear the Employee and make a decision. There are employment places, with limited number of personnel, to enable different and independent Managers undertake different roles in the disciplinary process. Employers are only required to meet the minimum statutory procedure on fairness as prescribed under Section 41 and 45 of the Employment Act 2007. There was no fundamental flaw in the procedure adopted by the Respondent.

74. The summary dismissal of the Claimant was fair in substance and on procedure. He does not merit compensation for unfair termination. The prayers for the various declarations in the Claim are baseless and rejected. The prayer for reinstatement in view of the finding on the fairness of termination is rejected.

75. The Industrial Court is guided by Section 12 [4] of the Industrial Court Act and Rule 28 of the Industrial Court [Procedure] Rules 2010, in considering an order for costs. It is not regulated by the Civil Procedure Act. The Court has wide latitude. Costs do not follow the event as frequently stated in the Civil Courts. Even the fees paid by Parties at the Industrial Court reflect the social foundations of the Court and its nature as an institution of equity and social justice. Guided by the Act and the Rules to which this Court is subject, the Court gives no orders on the costs

In sum IT IS ORDERED:-

- a. *Termination of the Claimant's contract of employment was fair both in substance and on procedure.*
- b. *The Respondent shall, within 30 days of the delivery of the Award, pay to the Claimant Kshs. 289,331 in annual leave pay; 12 days salary for October and November 2012 at Kshs. 65,112; and 2 days meal allowance at Kshs. 480 – total Kshs. 354,923.*
- c. *No order on the costs*

Dated and delivered at Mombasa this 28th day of November 2014

James Rika

Judge