



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2459 OF 2012

JAMES KIVONDO WAMBUA.....CLAIMANT

VERSUS

NEW KENYA CO-OPERATIVE CREAMERIES LIMITED.....RESPONDENT

Mr. Thuku for Claimant

Mr. Wachira for Respondent

JUDGMENT

1. Memorandum of claim dated 7th December 2012 was filed on the same date.
2. The Claimant claims damages for unlawful and unfair termination and in addition claims payment of terminal benefits set out as follows:
 - a. Payment in lieu of eighty one (81) days leave in the sum of Kshs.71,182.80;
 - b. Salary arrears for the month of August 2011 to July 2012 (12 months) in the sum of Kshs.316,368/=;
 - c. Gratuity in the sum of Kshs.21,091.20;
 - d. House allowance at 15% of the salary in the period August 2011 to July 2012 in the sum of Kshs.87,360.30;
 - e. One month's salary in lieu of notice in the sum of Kshs.26,364/=

Total net amount due – Kshs.522,366/=.

Facts of the case

The Claimant was employed by the respondent as a Stores Clerk on 4th December 2008 at a monthly salary of Kshs.15,336/=. The salary was later reviewed to Kshs.26,364/=.

4. The terms of employment of the Claimant changed in July 2011 pursuant to conclusion of a Collective Bargaining Agreement (CBA) between the Respondent and Kenya Union of Commercial Food & Allied

Workers Union.

5. On 3rd August 2011, the Claimant was suspended from work on allegations of stock variances in the company.
6. The Claimant remained under suspension until 19th July 2012, when his employment was terminated.
7. The Claimant was not paid any salary and allowances during the period of suspension contrary to **Clause 24** of the **Collective Bargaining Agreement** which provided otherwise.
8. The letter of termination refers to a disciplinary committee hearing held on 21st February 2012 following which the Claimant undertook to reconcile the stocks vide his letter dated 13th February 2012.
9. The Stock variance was said to be Kshs.154,217,189.01.
10. That the Claimant failed to reconcile the stocks though he was given opportunity to do so.
11. Final Audit Report showed a loss of Kshs.57,590,994.43.
12. The failure to reconcile stock was said to be in breach of **Clause 23** of the **CBA**.
13. The Respondent decided to terminate the employment of the Claimant normally and pay his terminal benefits in terms of the CBA.

Statement of Response

Admissions

14. The Respondent under paragraph 28 of the statement of Response admits owing the Claimant:
 - i. Nineteen (19) days arrear salary
 - ii. One month's salary in lieu of notice;
 - iii. Salary for the period between August 2011 and June 2012;
 - iv. Eighty one (81) days salary in lieu of leave days not taken;
 - v. Leave allowance earned but not taken
 - vi. Gratuity
 - vii. SPF as per pension deed

These payments to be made net of the statutory deductions.

Counter claim

15. The Respondent counter claims Kshs.56,670,657.98 being the total loss incurred by the respondent resulting from fictitious issues of the stock by the Claimant and sought to have the Claimant's terminal benefits partly set-off against the loss brought about by his negligence in performing his duties.

Misconduct

16. Under paragraph 6 of the statement of Response, the Respondent avers that the Claimant was suspended on 3rd August 2011 for negligence of contractual obligations resulting in the loss of Kshs.57,590,994.43 and stock variance of Kshs.154,217,189.01.
17. The Respondent further avers that the Claimant was accorded an opportunity to explain the said discrepancies but his response was not satisfactory hence the termination.

18. Under paragraph 15 of the Response, the Respondent states that an Audit team tasked to investigate the matter concluded that the Claimant colluded with suppliers and purported to have received materials while in actual fact, only part quantities were received in the store.

Testimony

19. The Claimant testified in support of the particulars of claim denying that he was negligent and / or colluded with others to steal from the Respondent.

20. He admits that he received a notice to show cause and explained in writing the discrepancies in the stocks at the store.

21. He also admitted that he attended a disciplinary hearing on 21st February 2012 in which he was given further three (3) weeks to explain the discrepancy.

22. He waited to be recalled to the hearing but that did not happen until he received a letter of termination.

RW1 was Florence Munga who testified in support of the Respondent's case.

23. She explained in detail how the discrepancies in stocks were discovered and an Audit was commenced to investigate the matter. She wrote a memo on 2/7/2011 concerning the discrepancies in filpack packaging materials. The Bu cards and delivery notes did not reconcile.

24. The Claimant was asked to explain by 26th July 2011 but this did not happen. This led to his suspension and institution of the Audit.

25. The witness was not involved in the disciplinary process of the Claimant stating that was done at the head office whereas she was based at Dandora Depot.

26. She told the Court that, the Claimant was not in-charge of the store at night but it was manned by the duty supervisor. She was not aware if requisition of stock was done at night in the absence of the Claimant.

27. RW2 was Victor Muigai, an Auditor of the respondent. He was based at the head office. He conducted the Audit and made a report reflecting variance in stock quantities received and those recorded. He also did a physical stock taking on 28th and 29th July 2011.

28. The stores used SAP operating System through which stocks were ordered, received and recorded.

29. He discovered a total loss of stock worth Kshs.56,270,657.98.

30. The Claimant did not witness the stock taking though he was invited. The report is dated 3rd September 2011. The Claimant was suspended on 3rd August 2011. The stores Manager was involved in the process.

Determination

31. There is no dispute that the Claimant is owed by the Respondent the terminal benefits outlined in this judgment.

The admissions are made in the statement of Response.

32. The Respondent offers to pay the enumerated terminal benefits, but prays that a sum of Kshs.56,670,657.98 be offset against the terminal benefits.

33. The Court is satisfied that the Claimant's employment was terminated for negligence of duty.

34. However, from the testimony of RWI, it is clear that it is not the Claimant alone who manned the store. His supervisor did so during the night.

35. The Claimant also had a stores Manager who directly supervised the store operations.

There is no sufficient evidence to attribute the stock loss partly or wholly to the conduct of the Claimant.

36. It cannot therefore be said that the Respondent has proved the counterclaim on a balance of probability. The counter claim is therefore dismissed considering all the circumstances of the case.

37. The Respondent having admitted owing the terminal benefits enumerated is hereby found liable to pay the same to the Claimant.

38. The Court directs the Respondent to compute the admitted terminal benefits and file the computation with the Court within fourteen (14) days from the date of this judgment.

The Respondent is to pay the computed terminal benefits with interest at Court rates from date of this judgment till payment in full.

The Respondent is also to pay the costs of the suit.

Dated and Delivered at Nairobi this 21st day of November 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE