



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1219 of 2010**

FRED V. MWARA ..... CLAIMANT

**VERSUS**

UNGA LIMITED .....RESPONDENT

*Rika J*

*CC. Elizabeth Anyango*

*Fred Mwara the Claimant in Person;*

*Mr. George Masese Advocate, instructed by the Federation of Kenya Employers for the Respondent*

**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

1. Fred Mwara filed his Statement of Claim in person, on the 12<sup>th</sup> October 2010. The Respondent, a Limited Liability Company registered under the Companies Act Cap 486 the Laws of Kenya dealing with manufacture of maize and wheat flour products, filed its Statement of Reply on 3<sup>rd</sup> November 2010. The Claimant, led in his evidence by his then Advocate Mr. Obwatini, testified and called one witness Trade Unionist Josphat Amachika Ojuok, on 27<sup>th</sup> October 2011. The Respondent called one witness Lenox Ngome, who serves as its Silo Controller based in the Rift Valley City of Eldoret. Ngome gave evidence on 15<sup>th</sup> October 2012, when hearing closed. Parties confirmed the filing of the closing submissions on 15<sup>th</sup> November 2012, and were advised by the Court Award would be delivered on notice.

2. Mwara testified that he was employed by the Respondent on 21<sup>st</sup> November 1994, as a Silo Attendant. He earned a monthly basic salary of Kshs. 23,437.35 and house rent allowance of Kshs. 5,624.95 as of the last day worked. On 16<sup>th</sup> December 2009, he was suspended from work. The letter of suspension dated 15<sup>th</sup> December 2009, written by the Human Resources Officer Paul Mucheru, alleged that Mwara received maize weighed at 4,935.222 metric tonnes, but transferred 4,851.817 metric tonnes to the Silos. The intake moisture was 13.5%, while transfer moisture was 12.5%. Variance due to moisture loss was 56.403 metric tonnes against actual loss of 83.405 metric tonnes. The records showed variance of 27.002 metric tonnes, which the Claimant was alleged not to have been able to explain. The letter advised Mwara that his conduct contravened the Company Code of Business Conduct and Ethics. He was suspended effective from 16<sup>th</sup> December 2009 and asked to report back on 30<sup>th</sup> December 2009.

3. On 30<sup>th</sup> December 2009, he reported to work. He found a letter of dismissal from employment in the following words-

*“following your suspension on December 16<sup>th</sup> 2009, followed by investigations carried on the variance of 27.002 metric tonnes of grains and findings of the joint management and union meeting held on Tuesday 29<sup>th</sup> December 2009, it was established that you were accountable for the variance.*

*In view of the above, it is with regret that we have to inform you of management’s decision to summarily dismiss you from employment as per Employment Act 2007 Section 44[c] and [e] and the CBA. Consequently, your last day of service will be December 16<sup>th</sup> 2009, the date of your suspension.*

*Your terminal dues will be paid as follows:*

- 1. Terminal benefits at a rate of one month for each completed year of service, in this case 15 years.*
- 2. Salary up to and including 16<sup>th</sup> December 2009.*
- 3. One month salary, in lieu of notice.*
- 4. Any earned overtime or shift allowance.*
- 5. Pro rata leave earned up to 16<sup>th</sup> December 2009, in this case 12 days.*
- 6. Less any money owed to the Company.*

*Payment of your terminal dues will be subject to company clearance and adequate handover to your supervisor as per the policy. Enclosed are Exit Assessment and Clearance forms for you to complete and return.”*

4.The Claimant completed the exit assessment and clearance forms as advised. The Respondent computed the terminal benefits due to the Claimant at Kshs. 351,572.70, then went on to claim Kshs. 708,853 the equivalent of 295.35 bags of maize allegedly lost through the Claimant. The Claimant did not agree with the decision and sought the intervention of his trade union the Kenya Union of Commercial Food and Allied Workers [KUCFAW]. The Respondent met KUCFAW on 19<sup>th</sup> January 2010 in the presence of Mwara. Following the meeting the Respondent wrote to Mwara on 10<sup>th</sup> February 2010 stating that the earlier decision dismissing the Claimant had been confirmed. The Union continued to engage the Respondent on the subject. On 4<sup>th</sup> May 2010, the Union wrote to the Respondent stating that,

*“.....Our investigations reveal that most of the reasons quoted by Mr. Mwara for the alleged variance are now being corrected. We wonder why the issue of possible theft of the maize by those entrusted with the security was not looked into. This is because the Silo Controller confirmed that no loss of maize was detected during the RUPA- UNGA transfer. Possibilities of maize being stolen while in custody of UNGA premises cannot be ruled out, and the finger points to the Security Guards and not Silo Attendant because there is no way the maize could disappear without their knowledge whether at day time or at night. Your letter of 30<sup>th</sup> December 2009 did not ask Mr. Mwara to meet the cost of the variance. Your intention to deduct the cost of the alleged loss is not only malicious, but also an intimidation to further cause double suffering to our member. It is therefore demanded that you pay Mr. Mwara all his entitlement without offsetting any money, in addition you pay him 12 months’ salary as compensation for wrongful dismissal. Otherwise he should be reinstated without loss of benefits.”* The Respondent did not give a reply until 5<sup>th</sup> August 2010, when it reiterated that its position had not changed. This marked the breakdown in the voluntary settlement efforts, paving way for the filing of the Claim in October 2010. Mwara is seeking an Award of the Court in the following terms-:

§ Full terminal benefits as promised in the letter of 30<sup>th</sup> December 2009;

§ Underpayment of wages as the Respondent paid him as grade 3, yet the CBA required he is paid as grade 8;

§ 12 months' salary in compensation;

§ Costs; and,

§ Any other relief the Court may deem suitable to grant.

5. Mwara told the Court he was a team worker. He did not have any problems with his colleagues. The loss in the metric tonnes could have resulted from the maize drying, or getting lost. The store keys were kept by the supervisor. Mwara was placed at grade 3, while the person who was doing similar duties in the Wheat Section was grade 8. The Claimant was trained at KARI in Njoro for Maize and Wheat grading. He would at times interchange with the person at the Wheat Section, yet that person was paid about Kshs. 26,000 basic pay in grade 8. The supervisor was Mr. Ngome. Ngome did spot checks frequently. The Claimant testified that he was not given a fair hearing before dismissal. Even after the dismissal, the Claimant was asked by the Human Resources Manager to come up with anything that could help the company. On cross-examination, Mwara testified that he reported the dispute to his Union, but could not say if the Union made a report to the Minister for Labour. The last communication from the Respondent to the Claimant, was the letter that informed him his appeal had failed. He was initially employed as a clerk. As Silo Attendant, his duties involved the receiving and transfer of grains; supervision of staff under him; operation of machines; and keeping custody of equipment. Laboratory was a different unit. Moisture metre detected moisture content. Sampling spear and spikes are used to obtain samples. Mwara operated the moisture metre. He was aware of the moisture limits. In March 2009, the moisture metre developed a problem. The Respondent sought replacement from Nairobi. Average transfer moisture was 12.8%. The Claimant was not supposed to receive at more than 13.5%. He received 4,935.222 metric tonnes but was not aware what was transferred. He was asked to show cause. He was asked to explain the loss and attended a hearing. He was accompanied by three trade union officials on 29<sup>th</sup> December 2009. He was not given information on the transfer moisture. There were security measures on transfer of the maize. The truck registration number was recorded, as well as the quantity of the maize, before leaving. The vehicles were not sealed during the transfer. Mwara supervised about 50 employees. Moisture loss is caused by various reasons, including drying. The Claimant was not supposed to account for the loss. The hearing of 29<sup>th</sup> December 2009 was not fair. The Claimant expected a decision after 7 days. No clerk has a grade certificate. It was wrong to pay Mwara as a Clerk. He testified that he was unfairly dismissed. He was not negligent in his work. He explained this evidence in redirection that he started off as a clerk, rising through the ranks after training and grading. In transferring of maize there was no maximum acceptable moisture content. On receipt there was a level of discretion. He prays that the Claim be allowed.

6. Josphat Amachika Ojuok is the KUCFAW Eldoret Branch Secretary. Mwara was a member of the Union. He worked for the Respondent for 15 years. He confided in the Union Branch Secretary that he had a clean record prior to the letters of suspension and dismissal. The Claimant was cleared and entitled to terminal benefits under the CBA. Clearing meant he was cleared of all allegations. The Respondent rejected the intervention of the Union, compelling Mwara to come to Court. Mwara was trained. He was graded. He should have been paid in accordance with his grade. He was underpaid. The CBA binds the Respondent, the Union and Unionisable employees. Mwara was covered. There was no indication that he owed the company money. He earned slightly more than Kshs. 23,000 monthly. A grade 8 employee under the CBA, earned Kshs. 26,136 monthly basic salary. Ojuok testified on cross-examination that he was not invited regarding Mwara's conduct. There were two meetings at Branch level. Ojuok was not invited, but follows up reported disputes involving his members. He did not authorize the meetings, but Shop Stewards have the authority to attend such meetings. They normally brief Ojuok afterwards. An employer is entitled to recover losses from an employee, who has occasioned the employer loss. The Claimant's basic pay was Kshs. 23,437 in December 2009. Grade 3 was supposed to earn Kshs. 21,000, and grade 8 Kshs. 23,869. The witness did not agree that Mwara was overpaid. It is the discretion of the management to elevate an employee. Ojuok discovered the Claimant was being underpaid only when he brought the complaint about termination to Ojuok. The Union did not report the dispute to the Minister. The Claimant was granted an opportunity to appeal. He exhausted this. If the Respondent had paid the Claimant's terminal benefits, it would have been the end of the matter. Ojuok concluded his testimony on redirection with the evidence that Shop Stewards have the authority of the Union. Mwara was trained for

grading. His duties included grading. He was cleared at Branch level. The Heads of the various Departments of the Respondent signed the clearance. There was no criminal charge against the Claimant on any allegation of loss of the grains.

7. The Respondent agrees the Claimant was its employee. He was employed as a Silo Attendant in November 1994, based at Eldoret. Between February and November 2009, the Claimant received a total of 4,935.222 metric tonnes of maize at the Respondent's Rupa Stores, Eldoret. The moisture was 13.5% on receipt. It was the Claimant's responsibility to ensure the maize was properly stored and accounted for, before transfer to the Silo. He only transferred 4,851.817 metric tonnes. He could not account for the variance of 83.405 metric tonnes. Moisture content was 12.5% on transfer to the Silo. Variance in total weight attributable to moisture loss would not have exceeded 56.403 metric tonnes. The unexplained variance was 27.002 metric tonnes. Mwara was invited to explain. He failed to do so. He was suspended, investigated, heard in the presence of his trade union representatives, and accorded a chance to appeal. He was dismissed in accordance with the governing CBA and Section 44 [4] of the Employment Act 2007. His terminal dues after tax came to Kshs. 264,950. The Claimant owed the Respondent Kshs. 708,853.00 which could not be entirely offset from the Claimant's terminal benefits. At no time did the Respondent underpay the Claimant. The Claim lacks merit and should be rejected with costs borne by the Claimant.

8. The Silo Controller, Lenox Ngome, explained that it was the responsibility of the Respondent to receive maize at the stores, and to transfer to the silos. Ngome was Mwara's supervisor. Mwara used to receive maize from different farmers. He recorded the moisture content. Some farmers bring dry maize, while others bring maize that is not completely dry. Moisture content involves the taking of the level of 'wetness'. The limit for moisture content on receipt is 13.5%. It was discovered there was a difference of 83.405 metric tonnes. Mwara was responsible. He received the maize. Mwara was provided a digital moisture metre. It was not faulty. He did not raise the issue that the metre was faulty. He was called upon to explain. He was given a chance to defend himself. Union representatives accompanied him. He blamed the variance on such things as the ineffective digital moisture metre and rodents. The Respondent arrived at a decision to dismiss, and gave him the reasons informing the decision. He appealed and the appeal was considered and rejected. Stores were fumigated. There were possible causes and actual causes for the loss. The Respondent focused on the actual causes. Mwara was the point-man. He could accept or reject the maize. He was properly trained in the field. His explanation was found unacceptable.

9. The witness told the Court while answering questions from Mwara that he was transferred to Eldoret on 1<sup>st</sup> April 2009. Purchasing of maize started 23<sup>rd</sup> February 2009, ending on 2<sup>nd</sup> April 2009. Ngome had only worked at Eldoret for one day when the purchase closed. Mr. Okoko was the former supervisor, handing over the stores to Ngome on 1<sup>st</sup> April 2009. Silo supervisor oversees fumigation. Mwara was in-charge of G6 store. The store was partitioned. Keys were entrusted the Silo Attendant. The security people did not retain another set. The moisture of 13.5% on receipt was expected. The Respondent relied on the figures recorded by the Claimant. The appeal meeting heard that there was loss of 420 kilogrammes of maize at the weighbridge. This was equivalent to five bags. There were two vehicles that registered the variance. Another employee called Muriithi worked on the consignment while the Claimant was away on training, but 99% of the transfer was done under Mwara's watch. Stores have grain spillage. Actual transfer moisture was 12.8., with 0.5% being the variance. This was so because at one time the machine had broken down. It was the Responsibility of the Silo Attendant to use working tools. The difference was used to compute the loss sustained by the Respondent. Ngome cleared the Claimant after dismissal, commenting that the Claimant was obedient, team leader, and worked under minimum supervision. The Accounts department cleared the Claimant. Ngome closed his evidence with the clarification that calculation of moisture content in the grains is scientific. He emphasized that the claim has no merit and should be rejected.

#### *The Court Finds and Awards:-*

10. It is not contested that Fred V. Mwara was employed by cereal products manufacturer Unga Ltd, as a clerk at Eldoret in 1994. He was trained at KARI, becoming a grader and then worked as a Silo Attendant. There is no dispute that he was suspended for failing to account for the loss of 27.002 metric tonnes of maize, which was transferred from the stores to the silo, under the responsibility of Mwara. The

parties do not disagree on the various levels of the recorded moisture content, or the metric tonnes of the maize upon receipt and transfer. The only disagreement was whether the Respondent exercised its management prerogative judiciously, by apportioning blame for the loss to Mwara, and by the decision to terminate the Claimant's contract of employment. This is the obligation created by the Employment Act 2007 Section 41, 43 and 45, which the Respondent must demonstrate it discharged. In plain terms, did the Respondent have a valid reason or reasons in dismissing the Claimant from Employment, and was the Claimant granted fair, just and equitable hearing before dismissal? Is he entitled to compensation and to terminal benefits as pleaded?

11. There is sufficient and persuasive evidence that Mwara was responsible for the receipt and transfer of grains in and out of the stores to the silos. He recorded the moisture, using the digital moisture reader provided for by the Respondent. He recorded the moisture when the maize was received and when transferred. He does not deny he received 4,935.222 metric tonnes. He transferred 4,851.185 metric tonnes. There was a huge difference of 83.405 metric tonnes. The transfer moisture was 12.5%. The variance in total weight attributable to moisture loss would not have exceeded 56.403 metric tonnes. From the variance of 83.405 metric tonnes, less the limit of 56,403 metric tonnes, the Respondent concluded there was a clear 27.002 metric tonnes, that the Claimant could not account for. The Respondent went on to deduct 420 kilogrammes lost at the weighbridge. There was a net loss of 26.582 metric tonnes, translating into 295.35 bags of the 90 kg sack lost. The cost of one 90 kg bag was fixed at Kshs. 2,400 leading to a total loss of Kshs. 708,853. It is this money that the Respondent proposed to offset from the Claimant's terminal dues which stood at a net of Kshs. 264,950.

12. These facts were not contradicted by Mwara. He was the point-man at the stores. He did not persuade the Court that the moisture readers were ineffective. His other explanations, recorded at the meeting of 19<sup>th</sup> January 2010, appear to the Court to have been diversionary. He spoke about rodents and pests. He mentioned unreliable security during transportation. He also blamed the loss on the allegation, that moisture reading was taken by a piece rate worker, and therefore unreliable. He however confirmed at the meeting that the moisture reader did not have any problem on receipt of the maize. Subsequently the Silo controller detected differences in the meters used between the lab and the silo. The problem was rectified, and necessary adjustments made to the record. The Court does not see the minor malfunction of the moisture reader as the real cause of the maize loss. The Respondent explained its stores were fumigated and no pest damage was detected. No loss of maize was reported during transfer. The Respondent used stock transfer forms. Mwara trained the piece rate worker to take the moistures. There was no issue that was not examined by the Respondent, raised in explanation or defence by Mwara. The Claimant did not make a credible explanation on the loss occasioned to the Respondent. Section 44 of the Employment Act 2007 placed an obligation on the Claimant to perform his duties properly. He was negligent, leading to his employer losing Kshs. 708,853. Mwara was given valid reason or reasons for dismissal.

13. Was he fairly dismissed? The record suggests he was fairly, justly and equitably treated. He was informed of the specific allegations and given precise figures. He was suspended. He was investigated. He was asked to attend a first level hearing and was accompanied by three trade union representatives of his choice at the hearing. He did not succeed and was allowed to challenge his employer's decision on appeal. The appeal was heard and rejected. Reasons were restated for the rejection. The Court does not see any departure from the minimum statutory disciplinary procedure, that could be attributed to the Respondent. Dismissal was substantively justifiable and procedurally fair. The Claim for compensation is rejected.

14. There was nothing to show that the Claimant was underpaid while in service. He did not at any time write a demand for underpayments while in employment. The argument about the grading is something that was just thrown into the equation by the Claimant's union. The Claimant did not direct the mind of the Court to any document that would lead to the conclusion that he was supposed to be in grade 8, earning a basic salary of Kshs. 26,136.95. He alluded to a colleague who was doing the same duties as he, in the Wheat Section, who was in grade 8 and earning this amount. The Court cannot accept such analogy. Grading is the prerogative of the employer. A Wheat Grader is specifically classified under Grade 8. There is nothing in the CBA on a Maize Grader. Employees do not enter Job Grade by analogy. It is for the parties to the CBA to negotiate express inclusion. The Claimant, or his witness from

the trade union, did not show how the CBA applied to the Claimant with regard to grade 8, how he progressed from grade 3 to 8, to merit the recognition of this Court as a grade 8 employee. The claim for salary underpayment is declined. ***In the end, the Court finds that the Respondent acted reasonably. The offer to pay the Claimant terminal benefits was fair. The intention by the Respondent to recover what was owed to the Respondent by the Claimant cannot be faulted. The Court has noted that the Respondent does not seek to pursue what it lost in a counterclaim. Mwara should accept the unfortunate circumstances under which he left Unga Limited and move on. The Claim is dismissed with no order on the costs.***

Dated at Nairobi this 8<sup>th</sup> day of April 2013

James Rika  
Judge