



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NO. 869 OF 2012**

*(Before D.K.N. Marete)*

**MATHEW NYANJONG.....CLAIMANT**

**VERSUS**

**EAST AFRICAN PORTLAND CEMENT CO. LTD.....RESPONDENT**

**JUDGEMENT**

This matter came to court vide a memorandum of claim dated the 23rd May, 2012. The issue in dispute is;

**“Wrongful, unlawful, unfair and discriminatory termination and failure to pay terminal dues.”**

The respondent through the Federation of Kenya Employers filed a Memorandum of Defense dated 30th July, 2012 praying that the matter be dismissed with costs.

The matter came to court for mention and hearing severally until the 8th October, 2012 when judgement for Kshs.620,215.19 being 2 months’ salary in lieu of notice, 36 leave days and gratuity on pro rata basis was made on admission. It was agreed that the rest of the claim proceed on trial. Despite controversy and counter controversy on payment and execution of this admitted decretal amount, the parties at the hearing on 20th February, 2013 agreed on settlement of the matter with an exception of item 5 of the prayers in the memorandum of claim which they agreed should be determined by court. The court went on to prod the parties to negotiate and settle the said item 5 to no avail.

The court by consent thereupon entered the following judgement;

1. THAT judgement be is hereby entered in favour of the claimant against the respondent for Kshs.1,967,890.00 touching items 1, 2, 3 and 4 as prayed in the statement of claim.
2. THAT the amount of Kshs.1,967,890.00 be subjected to statutory deductions as

provided by law.

3. THAT the amount of Kshs.1,549,519.00 be reduced by an amount of Kshs.72,220.00 being the claimants liability to the respondent.

4. THAT the net amount is Kshs.1,477,299.00 be paid to the claimant by the respondent within thirty days from today's date.

5. THAT the parties agree to file written submissions on item 5 for determination by court.

6. THAT there be a mention of the matter on 18th March, 2013 to confirm compliance and further directions of court.

7. THAT the respondent issues the claimant with a certificate of service within thirty days of the date of this order of court.

The contentious item 5 of the claim is actually part of the prayers by the claimant

These are;

1. Two months' salary in lieu of notice at gross rates - Kshs.387,713.70
2. Salary for the months of July to November 2010 - Kshs.969,284.24
3. 36 leave days as computed by the respondent - Kshs.166,500.00
4. Gratuity on pro rata basis at basis salary - Kshs.638,250.00
5. Damages for unfair termination for 12 months - Kshs.2,326,282.20

**TOTAL = Kshs.4,488,038.10**

The contention therefore is on damages for unfair termination calculable at twelve months gross salary amounting to Kshs.2,326,282.20. The gross salary of the claimant was Kshs.193,856.85 at the time of termination.

The law provides for the above as a relief for wrongful and unfair termination under section 49 (1) (c)), Employment Act, 2007 as follows;

**Section 49 (1)(c)**

*1. Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following-*

*(a).....*

*(b).....*

*(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time to dismissal.*

This facility is available to employees and is awarded by courts or a labour officer at the discretion of the officer or court and also depends on the circumstances of the case.

In the instant case, the parties were able to agree on all else except this item of the claim. Why? Your guess is as good as mine but I suppose it was perhaps due to the colossal amount involved which amount would not be sweet sounding to the liable party - the respondent.

The court therefore has to discharge its duty and determine this issue one way or the other. What factors would influence the court in making a determination of this nature and magnitude? One factor would be the magnitude of the unfair termination, the economic impact this had on the claimant employee, anguish and suffering visited on the employee by such unfair termination, the amount and nature of the other relief awarded to the claimant and the circumstances of the case in entirety.

My colleague and learned Judge James Rika, in the case of **David Mwangi Gioko and 51 others vs Nairobi City Water & Sewerage Company Limited**, Industrial Court cause No. 1722 of 2011 made the following observations;

*“This court has in the past held that there is need in resolving employment disputes to pay heed to the principle of **a fair go all round**. This principle requires the court to balance the interest of the employer and that of the employee. It is regularly invoked in the Commonwealth Jurisdiction, particularly Australia, to correct outcomes arising from the natural higgling of the marketplace. The court must carefully evaluate the circumstances in which the default or violation by the employer occurred, and also the voluntary effort made by the employer to remedy the economic injury suffered by the employee. It is relevant to consider the nature and purpose of the business undertaken by the respondent.’*

*“Again in Industrial Cause No. 611(N) of 2009 between **Maria Kagai Ligaga vs Coca Cola East and Central Africa Limited**, this court gave the view that the purpose of any employment compensation is not to unjustly make rich aggrieved employees, but to redress their economic injuries in a proportionate way. The court went on to say that, “**courts, even in advanced economies hardly award compensation based on the remainder years of service. Compensation must be reasonable and not appear to punish the employer. The law of unfair termination requires that the court observes the principle of a fair go all round.**” Employees are paid salaries for contributing their labour. When there is no contribution, there is no compensation. **A fair go all round** is based on an employment relationship of equal and reciprocal responsibility. The claimants did not voluntarily with-hold their labour; they were denied the opportunity to continue working for 5 years. It is not their fault, but should they be paid for the entire duration when they have not contributed any labour?”*

The principle of **a fair go all round** as elicited by Rika, J. applies to met out fairness in compensation to parties in an employment contract which unfortunately has been unfairly terminated. It is intended to be exercised broadly so as to imbue fairness and justice to all parties to the employment contract. Caution should, in my view, always be had so as to ascertain that the application of this principle mets out justice to the parties. It should at all times avoid situations where the application of the principle of **a fair go all round** comes to the aid of recalcitrant employers and glorify their exercise of impunity in the termination of employment.

Therefore, **a fair go all round** principle should be applied broadly and take all factors of termination of employment into account. In our situation, cases of outright abuse of law and industrial relations and practices are rampant due to a loose or weakened enforcement mechanism by our courts, tribunals and other like institutions. Often, one would find cases of outright impunity where employees are thrown out of employment under unsavory and inexplicable situations. This *in toto* denies them the opportunity to contribute their labour thereby rendering them destitute and lifeless for no fault of their own. All these are factors to be taken into consideration in such determination.

A strict and considered balance of the rights of all parties to the employment contract must always be undertaken if one was to avoid abuse and destruction of good industrial relations. This would also ensure appropriation of party’s socio- economic rights as enshrined in our constitution and other laws. Anything short of this would be a cropper and fallacious.

This claim is based on section 49(1) (c) of the Employment Act, 2007, a similar provision in section 15

(c) of the Labour Institutions Act having been repealed by section 31 of the Industrial Court Act, 2011. This mandates the court to exercise its jurisdiction and come up with appropriate compensation to aggrieved parties.

An assessment of compensation as at this prayer would have to be based on the analysis of the culpability of the parties to the dispute. This entails an assessment of the default of the parties in the occasioning of the termination of employment complained about. Again, this would entail the settlement of the issue as to whether the termination of the claimant was indeed wrongful, unfair and malicious as complained of. In this case, this issue is moot as is illustrated by the mutual agreement to settle.

The claimant was suspended on 14th July, 2010 on account of making unauthorized credit sales of 627 bags of cement to non guaranteed customers amounting to Kshs.482.790.00 The claimant was thereon asked to show cause why disciplinary action should not be taken against him and he explained that these were 585 bags and not 627 as claimed. A clarification meeting was convened and the claimant and his two colleagues from the Kisii office who had also been suspended attended. The accusation of having sold cement to unauthorized customers was admitted by all the three. Thereafter, the claimant's services were terminated on 18th November, 2010 on account of violating company procedure and leading to loss of company revenue.

The claimant's submission is that despite being invited for the disciplinary meeting to make representations regarding the accusations against him, he was not accorded an opportunity to ventilate his case as the committee had made a premeditated decision to terminate his services despite the fact that outstanding cement had been paid for. This rendered the hearing a sham and violated the rules of natural justice as to the right to a hearing. Procedural fairness was absent on the part of the disciplinary committee and therefore a contravention of section 41 of the Employment Act, 2007.

The claimant in his submission also argues that the decision to terminate his employment was discriminatory, malicious and in bad faith in that his colleagues, Messrs Chelang'a and Ombui had also sold 415 and 35 bags respectively in the same manner but these were reinstated back to work after the clarification meeting. This decision was malicious as the trio were facing similar charges but treated differentially. It amounted to discrimination and an unfair labour practice.

He also rubbishes the minutes of the disciplinary hearing as indeed, no hearing took place as he was not given a chance to make his representation. The minutes, even if these have to be relied on were an anthology of discrimination as is clearly expressed in the cases of Duncan Aboo, Peter Musyoka Kyalo and Samuel Semei. He was treated the same as Paul Nyangilo who had led to the loss of 5600 bags all valued at Ksh.4,155,200.00. This, he submits is unfair and I agree with his submissions.

The claimant further submits that the action by the respondent lacked procedural fairness in that before the onset of the disciplinary proceedings, all the cement so sold was paid for and therefore the respondent did not lose a cent in the entire drama. The allegation of loss of revenue in the termination letter did not arise and therefore, the unfairness.

Again, the practice of selling cement to non authorized/guaranteed customers on credit was a common practice and enhanced the revenue base of the respondent. According to the employee handbook, the offence committed by the claimant attracted the punishment of a warning letter as this was mere misconduct. Why would the respondent contemplate termination when it had not even warned the claimant of this or any other offence in the two years span of employment? This is unfairness, malice, bad faith and vengeance, he submits.

The accusation of misconduct is an afterthought on the part of the respondent. The defense of misappropriation and mismanagement of the respondent's funds, making false claim or returns are malicious in that these were not introduced initially to enable him address and answer the same.

The claimant therefore prays for reinstatement to his earlier position without loss of benefits or the equivalent of twelve months salary as compensation for wrongful unfair and discriminatory termination

and costs and interest.

The respondent denies the ground of unfairness and wrongfulness of the termination and goes on to justify the same. He ultimately prays that the claim under this heading be dismissed with costs.

Inasmuch as the respondent gets out of his way to demonstrate the procedural fairness of the termination of the claimant, he does not go far in countering the submissions of the claimant on discrimination and unfairness. These are emphatic and convincing and not an academic exercise like is the case of the respondents. Pertinent issues of procedure are addressed but the respondent fails to rebut or answer the same.

The settlement of the claim by way of agreement is also another pointer to the respondent's position on the subject. The initial judgement on admission amounted to Kshs.620,215.19 while the other admitted claim was Ksh.1,967,890.00. All this, out of a total claim of Kshs.2,161,747.94.

This is a total settlement at 91.0323%. It would appear that the respondent conceded 91% of the claim as settlement but declined a settlement on item 5 in preference to the court's finding on the same. In terms of a percentage of compensation on the same formulae, the claimant would be entitled to;

$91/100 \times 12 \text{ months} = 10.8 \text{ months as compensation.}$

I therefore award the claimant compensation on the same terms as the settlements *inter partes*. This is eleven (11) months' gross salary for wrongful and unfair termination of employment. This would be;

$11 \text{ months} \times \text{Ksh.193,856.35} = \text{Kshs.2,132,419.85.}$

This is a fair and adequate compensation in the circumstances.

The claimant sums his submissions by a claim for reinstatement, costs and interest at court rates. I would hesitate to make any orders for reinstatement the same having not been prayed for or even mentioned in the claim. Again, all these prayers were not included as issues for determination by the parties at the date and time of the consent order *inter partes*.

I have, however observed the conduct of the parties in this suit and appreciate that this exercise was absolutely unnecessary if the respondent had heeded calls by the claimant to meet and pay his terminal dues earlier. Despite various overtures by the claimant through his advocates and even the Commission on Administrative Justice, the respondent perpetuated a denial of this claim thereby forcing the claimant to court. He should therefore be condemned to costs and I so find. I therefore order costs to the claimant in the circumstances.

**Dated, delivered and signed this 15th day of May, 2013**

**D.K. Njagi Marete**

**JUDGE**

**Appearances**

**1.Mr. Wesonga instructed by Wesonga & Company Advocates for the claimant.**

**2.Mr. Njiru instructed by the Federation Kenya Employees for the respondent.**