



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1792 of 2011

NICHOLUS MUASYA KYULA.....CLAIMANT

VERSUS

FARMCHEM LTD RESPONDENT

JUDGMENT

The Claimant Nicholas Muasya Kyula filed the memorandum of claim on 21st October, 2011 through J.O. Juma & Company advocates. The claimant's further affidavit was filed on 14th December, 2011. The Respondent's Replying memorandum was filed on 14th November, 2011 through Wambua Kilonzo & Company Advocates.

The claimant is praying for judgment against the Respondent for:

- (a) A sum of Ksh.4,142,160/= being
 - (i) Salary for 12 days in October 2010 - 90,960/=
 - (ii) Mileage allowance for September 2010 - 50,000/=
 - (iii) Mileage allowance of October 2010 - 50,000/=
 - (iv) Entertainment allowance September 2010 - 15,000/=
 - (v) Entertainment allowance October 2010 - 15,000/=
 - (vi) 12 months salary for unfair dismissal - 3,628,800/=
 - (vii) One month's salary in lieu of notice - 292,400/=
 - (viii) Unpaid leave - 252,000/=
- (b) Interest
- (c) Cost of suit
- (d) Certificate of service

(e) Any other suitable relief the court may grant.

The Respondent pleaded that the claimant's case be dismissed with costs because:

- (a) the dispute is premature and incompetent;
- (b) the termination of the claimant's employment was necessary and summary; and
- (c) the claimant's claim is bad in law, unlawful, frivolous, scandalous, vexatious and an abuse of court process.

The case was heard on 16th October, 2012 and on 26th October, 2012. The claimant gave evidence to support this claim as follows:

1. The Respondent employed the claimant since 2nd May, 1994. He was employed as a Finance Manager until 12th October, 2010. As per the letter at folio 5 on the memorandum of claim dated the 12th June 2002, the duties of the claimant as the Respondent's Finance Manager included:

- (a) Cash flow planning and management;
- (b) budgeting and budgetary control;
- (c) preparation and presentation of all financial statements;
- (d) assets management (stocks, receivables and fixed assets);
- (e) implementation and review of internal controls;
- (f) training and head of finance department;
- (g) responsible for all company tax matters; and
- (h) company insurance.

2. On 3rd October, 2010 the claimant stated that he was taken ill and hospitalized at the Metropolitan Hospital as a result of which he could not attend and report to work on 4th and 5th October, 2010. He went to Hospital on 4th October, 2010 which was a Monday. He called the Respondent's Human Resource Manager one Catherine Mutinda and he explained to her his inability to report at work in view of his ill health. The hospital had advised him to have a sick off on 4th and 5th October, 2010. He was scheduled to report on duty on 6th October 2010. The sick chit marked C on the claimant's further affidavit shows that the hospital recommended the claimant's convalesce at home from 4th October, 2010 for two days and to resume work on 6th October 2010 and the sick chit was signed by one Dr. Shibona.

3. The claimant was scheduled to report at work on 6th October, 2010 but, he testified, the Respondent's Human Resource Manager called him on phone and informed him that the Respondent Managing Director had directed that the claimant should rest in view of the sickness and report on duty on 11th October, 2010. The Claimant was happy with such a kind consideration and so he reported on duty on 11th October, 2010 as advised.

4. On 11th October, 2010 he reported on duty at 6 a.m. His office chair was missing and so he proceeded to the Monday weekly Senior Management Meeting at the Board Room. The meeting proceeded the whole day.

5. On 12th October 2010, he was on Outer Ring road driving to work when the Respondent's Managing

Director one Charles Mulinge called him on the cell phone to convey that he was waiting for the claimant at the office. On arrival, the claimant went straight to the Managing Director's office. He found the Managing Director and the Human Resource Manager. The Managing Director informed the claimant that his employment had been terminated and the claimant stated that he had no problem provided his terminal dues were paid. There was no formal communication prior to the verbal termination and the Managing Director promised to put down everything in the termination letter.

6. The claimant testified that no reason for termination had been given, no notification for the termination and no hearing at all on the reasons leading to the termination.

7. That on the 12th October, 2012, the date of termination, the claimant prepared a handover report for his deputy. The report dated 12th October, 2012 is the annex at folio 10 on the memorandum of claim. On the same date, 12th October, 2012, the claimant underwent the exit interview as per folio 9 on the memorandum of claim.

8. The Respondent's Managing Director had mentioned to the claimant that while he was on sick off, there was a cheque that had not been paid. The claimant speculated that was the reason for termination but he was never told the reason for the termination.

9. Throughout his service the claimant stated that he had been a good performer earning promotions and performance bonuses as per the annexures at folio 12 to 19 on the memorandum of claim.

10. At the time of termination the claimant had put in about 17 years in the service of the Respondent. Throughout the service he had no any disciplinary issues. He had risen from a Trainee Management Accountant, Management Accounts Assistant, Financial Assistant, Financial Accountant and finally Finance Manager.

11. He testified that he was entitled to Ksh.50,000/= per month for mileage, Ksh.15,000/= per month for entertainment and gross monthly salary of Ksh.292,400/=. The mileage and entertainment would be paid on refund basis up to the agreed amounts as stated.

12. After the termination the Respondent did not pay the claimant the due terminal benefits as claimed in the memorandum of claim. A demand for payment was made as per folio 20 in the memorandum of claim.

13. That during the employment agreements were in writing but at termination it was oral and unprocedural because, the claimant stated, he was not given the reasons, the notice or any hearing.

14. The issues of absconding duty were not true and they were only raised in court. The claimant stated he fell sick on 3rd or 4th October, 2010 and reported on duty on 11th October, 2010 under very clear notification to the Respondent and the Respondent having agreed to such arrangements.

15. That the claimant was not aware of any cheques that bounced or did not go through while he was on the sick leave. That he had an able deputy who was able to deal with all the necessary issues wherever he was away or on leave like it was the case on 4th to 10th October, 2011. The claimant denied ever having seen the letter dated 4th October, 2010 at folio 6 and the letter dated 8th October, 2010 at folio 5 on the replying memorandum.

The letter of 4th October, 2010 stated as follows:

“Monday 4 October 2010

Nicholas Muasya

P.O. Box 18407

00500 NAIROBI

Dear Nicholas,

PERFORMANCE INDICATORS

Reference is made to our letter dated January 16, 2009 detailing your job description, our letter dated 1st July, 2010 to NIC Bank stopping payment and my e-mail correspondence dated 15 September 2010.

As stated in the above letters a primary responsibility of this position is to ensure continued confidence in the financial viability and stability of the company through timely satisfaction of short and long-term funding requirements through banking arrangements. It is noted however that arrangements put in place lead to cancellation of the cheque issued to Amiran Kenya (no.87 dated 30th June 2010 valued US\$34,000). Further, it is noted that on or before 30th August, 2010 the stock loan that was due for payment was not adequately provided for thus leading to an unauthorized excess on overdraft facility as still captured on Barclays Bank Statement dated 16 September 2010 (refer to email 17 September 10 Payment Plan).

The above, as discussed, poses great reputational risk to the company and remedial action is required.

I look forward receiving your response on the above issues and continued co-operation.

Yours faithfully,

FARMCHEM LIMITED

SIGNED

Charles Mulinge

Managing Director

c.c. HR & Administration Manager”

On the other hand, the letter of 8th October, 2010 stated as follows:

“Friday 8 October 2010

Nicholas Muasya

P.O. Box 18407

00500 NAIROBI

Dear Nicholas,

PERFORMANCE INDICATORS

Reference is made to our letter dated October 4, 2010 on the above.

On or before 4, 2010 two cheques were released to suppliers, specifically US\$27,596.80 to Amiran Kenya and Ksh.540,250.50 to Total Kenya for presentation.

On the material day of presentation provision had not been made for their payment or communication of the urgency of the matter to the undersigned and/or your deputy. Consequently NIC Bank reversed the payment and the cheques were unbanked at close of business. Notably also a third cheque of Ksh.525,000 issued to PC World was presented for payment, yet internal cashflow reports, indicated it as a "Payment ready but not released".

As a Senior Manager of this Company the above described level of work is unacceptable and amounts to gross negligence of duty and deliberate falsification of records.

Given the above, without prejudice, the Company has no option but to terminate your services.

To facilitate quick payment of your final dues provide a detailed hand over report to the undersigned which should be in line with your key performance indicators. Further, you are expected to submit your duly executed PMF and exit interview forms prior to your departure. Ensure your clearance forms is completed and signed promptly, including return of company assets.

We take this opportunity to thank you for the services rendered to Farmchem and wish you every success in the years to come.

Yours faithfully,

FARMCHEM LIMITED

SIGNED

Charles Mulinge

Managing Director

c.c. HR & Administration Manager"

16. The claimant testified that he was not served any of the two letters quoted above and he only saw them in court records. That if he had been terminated on 8th October, 2010, then why would he have been on duty on 11th October, 2010 and do the handover report on 12th October, 2010.

17. The claimant further testified that if a cheque was to be paid, the bank would call the signatories to confirm its validity. He was not a signatory and he did not negotiate with the banks. His deputy made the vouchers, he approved them and the Managing Director would sign the cheques. It was the claimant's duty to ensure that funds were available and he would not approve a cheque to be issued unless there were funds to pay it. That he never approved cheques where funds were not available and he was a stranger to the dishonoured cheques as alleged in the two letters quoted above. If any dishonoured cheques did come up, then it must be the week he was on sick leave. The claimant further testified that the letter of 4th October, 2010 referred to cheques and transactions alleged to have taken place in June, July and August 2010, many unexplained days before the letter was purportedly written.

18. There were no internal financial regulations or manuals. The respondent's work was done on the basis of evolved practices.

19. The claimant testified that there was bad blood and hatred between him and the Respondent's Managing Director because of two reasons:

(a) Since May 2010 the Managing Director (Charles Mulinge) showed open hatred to the claimant without any explanation. That was shown clearly when he extended the claimant's leave from 6th to 10th May, 2010 without explanation and which was repeated on October 5th and 6th 2010.

(b) The Managing Director wanted the claimant to support him on disputed sale of a plot to Farmchem Ltd which would dilute the ownership of Respondent's Chairman one John Mutinda. The Managing Director had stated to the claimant in presence of the Claimant's deputy one Moses Ochanda that the claimant would either support the transaction or get out of the Managing Director's "*dancing floor*".

20. That after the termination the claimant was employed by a furniture company which was not a competitor to the Respondent.

21. The claimant denied that it was not his responsibility that certain cheques bounced as alleged by the Respondent. Further he had not been negligent in his duties and he did not abscond duty.

22. That staff matters between the claimant and the respondent would be signed by both the respondent's Managing Director and the Chairman. The letters quoted earlier in this judgment were not genuine, according to the claimant, because they were signed by the Managing Director only.

The Respondent's witness was its Managing Director one Mr. Charles Ngalaka Mulinge. He states as follows:

1. That the Respondent is in the business of importation, repackaging and distribution of agricultural equipment, chemicals, seeds and fertilizers and their core clients are farmers.

2. The claimant was the Respondent's employee from 1994 and at his termination he was the Finance Manager. He was the overall officer on financial matters.

3. When a supplier makes a demand for payment, the same is taken to the Finance Department. The accountant receives all the creditors' demands together with all supporting documents. These include the invoices and the delivery notes. The credit accountant is under the Finance Manager. The credit accountant processes the application for payment which is checked by a finance accountant and approved by the Finance Manager. Against the approval, a cheque is printed and presented to the Managing Director and the Chairman for signing – the two are the respondent's only signatories for the cheques.

4. That any confirmations about validity of a cheque would be directed to the Finance Manager by the banks. The Finance Manager kept the cheques.

5. The claimant was dismissed on 12th October 2010. The summary dismissal was due to the abscondment of duty from 4th October, 2010 to 11th October 2010. Further during the abscondment cheques were presented and returned unpaid because no approvals had been given by the Finance Manager. The cheques had not been paid because in the period of abscondment the claimant as Finance Manager had not made adequate arrangements because the relevant account was under funded. The Respondent operated numerous bank accounts and there would be need to transfer funds from other accounts or request for a bank overdraft. The claimant was not present and did not give a brief to his deputy. Thus by the letter at folio 6 of the replying memorandum the claimant was required to make explanations. Had the claimant made arrangements with the witness or his Deputy the problem would not have arisen on 4th October, 2010.

6. On the same week the claimant was absent, three other payments were presented on various days of the week where adequate provisions had not been made so the cheques were dishonoured as per folio 5 letter dated 8th October, 2010, on the replying memorandum. It was the duty of the Human Resource Manager to deliver the two letters. Accordingly the claimant was sacked and he was to visit and handover. The reputation of the respondent was injured due to the bounced cheques.

7. That on 12th October, 2011 the claimant attended a meeting at which he accepted the termination provided his terminal dues were paid. The witness did not know whether the Human Resource manager had delivered the letter as addressed to the Claimant in October, 2010.

8. It was true that on 3rd October, 2010 the claimant had said he was unwell. The witness saw the sick chit from hospital but could be it was given to the Human Resource Manager by the Claimant. The witness did not know whether it was so given. The sick chit lacked the hospital's seal.
9. There was no ill will between the claimant and the witness as they worked professionally. In all the performance appraisals the claimant had performed and had earned the bonus. For all the 16 years the claimant worked with the Respondent there may have been warning letters which were not before court.
10. There were letters referred to in the letter of 4th October, 2010 and which were not tabled before the court for unclear reasons. The discussion of 12th October 2010 came after the termination letter of 8th October, 2010.
11. In absence of the claimant, his deputy who was on duty on 4th October, 2010 to 11th October 2010 would step in. the claimant may have conducted the Human Resource Officer and he ought to have conducted the Managing Director, the witness, as his immediate boss.
12. The claimant's certificate of service and his final dues were prepared but not forwarded because the claimant's address was not known to the respondent.
13. The claimant was dismissed summarily for abscondment and for neglect of duty.
14. The claimant could not be responsible for the cheques issued in his absence.
15. The witness confirmed that on 4th October, 2010 and on 5th October, 2010 he was informed on phone that the claimant was sick.

The issues for determination are whether the claimant's termination was unfair and whether the claimant is entitled to the remedies as prayed for.

The court has considered the evidence on record, the pleadings and submissions made and makes the following findings:

1. It is not disputed that the claimant was employed by the Respondent from 2nd May, 1994 to 12th October, 2010 being over 16 completed years of service. The claimant's gross salary at the termination was Ksh.292,400/=.
2. The evidence on record shows that the claimant was unwell on 4th, 5th and 6th October, 2010. There is no doubt that the claimant was absent from work on the material week on account of ill health. The court finds that in the circumstances of this case, the claimant was entitled and had a good or reasonable cause to be absent on account of ill health. The court therefore finds that the claimant did not abscond duty but was absent for reasonable cause as proved.
3. The Respondent's witness confirmed that whenever the claimant was absent, the claimant's deputy would step in to perform the duties of the claimant. On the material week, the Respondent's witness testified that the claimant's deputy was on duty. Accordingly, the court finds that on the material week the claimant was absent on account of ill health, the claimant cannot be held responsible for any lapses in the Respondent's financial management issues. It was for the claimant's deputy to take charge and deal with the assignments.
4. The letters on performance indicators at folios 5 and 6 on the memorandum of reply addressed to the claimant were drawn at the time when the claimant was on the sick leave. The respondent has failed to produce any evidence to show that they were delivered. The letter at folio 6 refers to transactions in January, 2009, July 2010 and a cheque drawn or dated 30th June 2010. It is obviously an afterthought and evidence of allegations against the claimant. Similarly the letter at folio 5 dated 8th October, 2010 raises allegations which the respondent has failed to prove. There was no evidence that the claimant approved

the issuance of the alleged cheques or that the cheques were in fact drawn. The alleged diminished reputation of the respondent was never proved. The court finds that the allegations leveled against the claimant with respect to cheques that were not paid have not been proved.

5. The Respondent has failed to produce evidence of service of the termination letter dated 8th October, 2010 at folio 5 on the memorandum of reply. Further, the claimant and the Respondent's witness confirmed the meeting of 12th October, 2010.

Accordingly, the court finds that claimant was verbally terminated at the meeting of 12th October, 2011 without due notice and a hearing to defend himself.

6. The court therefore finds that the termination of the claimant's employment by the respondent was unfair because the Respondent has failed to prove the reasons for termination as envisaged under Section 43 of the Employment Act, 2007, and further the respondent did not accord the claimant a notification and a hearing as provided for in Section 41 of the Act.

In making the finding the court considers that it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at. Typically, the process would entail the following steps:

- (a) A report to the relevant authority that a misconduct has been committed by an employee.
- (b) A preliminary report to gather relevant information on the alleged misconduct.
- (c) If the evidence is obvious and the misconduct is gross, the employer can summarily dismiss.
- (d) If the evidence is not obvious and the misconduct is not gross or its weight is not clear during the preliminary investigation, the proper notification is drawn. The notification commonly called a show cause letter must clearly spell out the intended ground for termination being misconduct, poor performance or physical incapacity. The particulars must be clear enough for the employee to be able to effectively defend himself or herself. The notice must give the employee reasonable time within which to respond.
- (e) Upon responding or the time allowed lapsing, the employee should be called to a hearing. At the hearing all relevant information should be recorded in a fair process where the complainant is not leading or chairing the proceedings. The employee should be given ample chance to exculpate oneself. A third party of the employee's choice should be permitted to attend the hearing.
- (f) A report of the hearing proceedings should be drawn and formally maintained by the employer as evidence of due process of fairness. The report must set out the findings on the allegations, any mitigating or aggravating factors and the recommendations which may include the termination.
- (g) The decision made must then be communicated to the employee.

In the instant case, the court finds that the reasons for termination were not proved and the procedure requiring notification and a hearing was not complied with. The termination was unfair.

7. The next issue for determination is whether the claimant is entitled to the remedies as prayed for. The court finds that it is not disputed that the claimant is entitled to October house allowance and salary. The court also finds that the claimant was entitled to and the respondent has not proved that he paid the claimant under the heads of claims set out in the memorandum of claim.

In the circumstances the court makes the following awards as the claimant's entitlement:

- (a) Salary for 12 days worked in October 2010 - Ksh.90,960/=

(b)	Mileage allowance September 2010	-	Ksh.50,000/=
(c)	Mileage allowance October 2010	-	Ksh.20,000/=
(d)	Entertainment allowance September 2010	-	Ksh.15,000/=
(e)	Entertainment allowance October 2010	-	Ksh.6,000/=
(f)	12 months gross salary for unfair dismissal	-	Ksh.3,508,800/=
(g)	One month salary in lieu of notice	-	Ksh.292,400/=
(h)	Unpaid annual leave	-	<u>Ksh.252,000/=</u>
	Total	-	<u>Ksh.4,235,160/=</u>

In computing the entitlement on entertainment and mileage for October 2010 the court has taken into account that the claimant worked only twelve days in October. Further in granting the twelve months gross salaries for unfair termination the court has taken into account the claimant's long service of over sixteen years, the absence of any mitigating factors by the respondent for a lower entitlement and the flagrant breach by the Respondent of the provisions of the Employment Act, 2007 on fair termination.

In conclusion judgment is entered for the claimant against the Respondent for:

- (a) a declaration that the termination of the claimant's employment was unfair;
- (b) the respondent to pay the claimant Ksh.4,235,160/= plus interest at court rates from the date of the judgment till full payment;
- (c) the respondent to issue and deliver the claimant's certificate of service, and
- (d) the respondent to pay the costs of this cause.

Signed, dated and delivered at Nairobi this 9th day of November, 2012.

Byram Ongaya

JUDGE