



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.185 OF 2015

(Before D. K. N. Marete)

PETER ODHIAMBO ANGIRA.....CLAIMANT

VERSUS

MINI BAKERIES (NAIROBI) LIMITED.....RESPONDENT

JUDGEMENT

This matter is originated by a Memorandum of Claim dated 9th July, 2015. The issues for determination as set out there in are;

- a. *Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent.*
- b. *Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim.*
- c. *Whether the claimant is entitled to an award of certificate of service and*
- d. *Who should pay costs of the suit.*

The respondent in a Respondent's Reply/Defence to the Claimant's Memorandum of Claim dated 22nd July, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this suit, he was employed by the respondent as an oven man with effect from 1st November, 2011. He worked hard and was promoted and as a result he was promoted to be in charge of hand bakers (CHB) and transferred to work in a bakery that transported bread where he served until the date of his unfair and unprocedural termination. At the time of termination, he earned Kshs. 13,556.00.

It is the claimants further case that his employment was terminated unprocedurally and without lawful cause on the grounds of absenteeism which was not true. Further, this was against the letter and spirit of a CBA between the respondent and KUCFAW and also violates Section 41, 43, and 45 of the Employment Act, 2007. He prays for compensation as hereunder;

- i. *One month pay in lieu of notice*

Basic salary
13,526/=

Kshs.

ii. Severance pay

17 days x yrs worked x basic x 30 days

17 x 3yrs x 13526 x 30 days

Kshs. 22,994.20/=

iii. Leave dues

26 days x basic + house allowances yrs worked /26 days

26 days x 17207 x 3yrs /26

Kshs.44,738/=

iv. Rest days

4 days x month worked x basic + house allowance /30 days

4 days x 39 months x 17207/30 days

Kshs. 89,476.40/=

v. Compensation for unfair termination

Gross pay x 12 months

17207 x 12 months

Kshs.206,484/=

TOTAL

KSHS.377,218.60/=

In the penultimate he prays for;

- a. Declaration that the dismissal was unlawfully, unprocedurally and unfairly in the circumstance the claimant is entitled to compensation as prayed for in paragraph 12 above.
- b. The sum of Kshs. 377,218.60/- as set out at paragraph 12 above.
- c. Cost of this suit and interests on (b) and (c) at court rates from time of filing the suit until payment in full and
- d. A certificate of service as per section 51 of the Employment Act.
- e. Any other further and better relief the Honourable Court may deem just and fit to grant.

The respondent in the Respondent's Reply/Defence to the claimant's Memorandum of Claim denies the claim and avers that the claimant has never been in his employment. She further avers that the claimant is guilty of fraud as follows;

- a. Claiming to have been employed by the respondent knowing that fact to be false.
- b. Committing forgery.
- c. Masquerading as the Respondent's employee.

The claimant therefore cannot sustain the claim as there was no employment and that therefore the claim fails *in toto*. She calls the claimant to strict proof thereof and production of contractual documents in

evidence thereof. The respondent in the penultimate denies receipt of a notice of intention to sue from the claimant.

This matter came to court severally until the 20th November, 2015 when it was heard.

The issues for determination therefore are;

1. Whether the claimant was an employee of the respondent?
2. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who should pay costs of the suit?

The 1st issue for determination is whether the claimant was indeed an employee of the respondent. The pleadings, evidence and submissions of the parties on this are rivalry and conflicting. It is the claimant's case that he was employed by the respondent whereas the respondent denies this. The claimant in support of his case sought to rely on documents annexed to the claim and also the claimant's supplementary list of documents dated 10th September, 2015 and filed on 23rd instant. These are;

- a. *A letter of calculation of terminal dues in respect to Mr. Peter Angira against Mini Bakeries Limited prepared by Josphat Ojwok, Branch Secretary, KUCFAW, Eldoret.*
- b. *A demand letter dated 11th June, 2015.*
- c. *Certificate of posting by Mwakio, Kirwa & Company Advocates to the respondent.*
- d. *A letter of appointment of Japheth Luvaga Jawasi.*
- e. *Job identification card of Johanah Kosgei.*
- f. *Collective agreement between the respondent and Bakery, Confectionary, Food Manufacturing and Allied Workers Union dated 30th June, 2011 for the period 1st May 2011 to 31st April, 2014.*
- g. *Collective agreement between the respondent and Bakery, Confectionary, Food Manufacturing and Allied Workers Union dated 11th September, 2014 for the period 1st May, 2014 to 30th April, 2017.*

The claimant reiterates these in cross-examination and written submissions. It is the claimant's further case in support of using the documents for Japheth Luvaga and Johanah Kosgei that these were utilized to bring out a case of employment the two having been his colleagues at his place of work. He also avers and contends in testimony that his only means of association with his employment, a gate pass was confiscated on termination. This is therefore the only means available to confirm his employment with the respondent.

Tradition has it that on departure from employment, a return of all documents in support of employment is demanded by employers. These include staff identity card, medical cards, gate passes and any other affiliated documents of employment. This would support the position of the claimant in the circumstances.

The claimant further submits that he was in employment for more than three months and therefore relies on Section 9 of the Employment Act, 2007 which obligates an employer to reduce a contract of employment into writing as follows;

“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with sub-section (3)”

He also seeks to rely on Section 10 (7) of the Employment Act, 2007 which provides that;

“Where an employer fails to produce a written contract in legal proceedings then the employer must prove or disprove an alleged term of the employment relationship.”

Coupled with Section 74 of the Act which provides that employers should keep written records of all employees and in any event produce these in evidence as would be required, the claimant rests a case of negligence in compliance with the law on the respondent.

The respondent’s defence endeavors to contradict the evidence of the claimant but this fails miserably. The evidence of the claimant in support of his case overwhelms the defence. The defence as presented comes out as mere denial of the claimant’s case. On an application of the doctrine of balance of probability and preponderance of evidence, the matter tilts in favour of the claimant. In any event, the respondent was always duty bound to produce written evidence of the contract *inter parties*. I therefore find that the claimant was an employee of the respondent and hold as such.

The 2nd issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. It is the claimant’s case and submission that his employment was terminated on grounds of absenteeism. The respondent denies this and particularly denies that the claimant was in her employ.

The claimant sets out a case of unlawful termination and submits this was contrary to Section 45 (2) of the Employment Act as follows;

A termination of employment by an employer is unfair if the employer fails to prove-

- a. *That the reason for the termination is valid;*
- b. *That the reason for the termination is a fair reason-*

(i) related to the employees conduct, capacity or compatibility or

(ii) based on the operational requirements of the employer and that

- c. *That the employment was terminated in accordance with fair procedure*

He also seeks to rely on the case of **Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR** which emphasizes the requirements of substantive and procedural fairness in cases of termination and employment.

Section 45 (4) (b) of the Employment Act, 2007 provides as follows:-

....that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.”

He further sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

- a. *That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.*

- b. *That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
- c. *That the employer has heard and considered any explanations by the employee or their representative.*
- d. *Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

The authorities cited by the claimant are all relevant but may be inapplicable in the circumstances of this case. This is because having established a case of employment and there being no defence for termination of employment, I find a case of wrongful, unfair and unlawful termination of the employment of the claimant by the respondent. The defence in any event closed at a case of no employment by the respondent.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. Having succeeded on issues no. 1 and 2 above the claimant is entitled to the relief sought. I therefore allow the claim and order relief as follows;

- i. One month's pay in lieu of notice Kshs. 13,556.00
- ii. Three months salary as compensation for unlawful termination of the employment.

Kshs. 13,556.00 x 3 = Kshs. 40,668.00

TOTAL Kshs. 54,224.00

- iii. That the respondent be and is hereby ordered to issue a certificate of service to the claimant.
- iv. The cost of this claim shall be borne by the respondent.

Delivered, dated and signed this 24th day of February 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.
2. Mr. Siele Sigira instructed by Mr. Siele Sigira & Company Advocates for the respondent.