



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 508 OF 2018

BAKERY, CONFECTIONARY, FOOD
MANUFACTURING & ALLIED WORKERS UNION.....**CLAIMANT**

VERSUS

KASSMATT SUPERMARKET.....

.....**RESPONDENT**

JUDGMENT

1. The Claimant instituted this suit by a Statement of Claim dated 19th February 2018 alleging unlawful termination of the Grievant's employment. It is the Claimant's case that the Grievant was employed by the Respondent in or about February 2013 as an oven man earning a monthly salary of Kshs. 17,500/-. The Grievant is said to have served diligently, without warning or reprimand, until 16th May 2017 when his employment was allegedly terminated. According to the

Claimant, on the material day at about 9.00am, the Grievant's supervisor accused him of idling and labelled him "lazy" before reporting the matter to the manager. The manager thereafter summoned the Grievant, accused him of insubordination, and ordered him to leave the Respondent's premises. He was escorted out by security personnel and was not informed when, if at all, he was to resume duty. Further, instructions were allegedly issued to the gatekeeper not to allow him back into the workplace.

2. The Claimant averred that the Grievant only became aware that his employment had been terminated during conciliation proceedings. It is therefore its position that the Respondent violated the mandatory procedural safeguards under section 41 of the Employment Act. Additionally, it faults the Minister's finding that he was not locked out or declared redundant hence he should only be paid terminal dues. Consequently, the Union urges the Court to:

- a. Declare the Grievant's termination of employment unlawful and illegal.

- b. Order the Grievant's reinstatement to his former employment without loss of pay and benefits.
- c. In the alternative and without prejudice to prayer b) above order that the Grievant be paid his dues broken down as: Kshs, 19,909/- pay in lieu of notice, Kshs. 52,374/- unpaid leave, Kshs, 57,816/- in underpayments, Kshs. 1,035,031.62 in unpaid overtime, Kshs. 274,950.32 compensation for loss of employment, Kshs. 10,618.37 in unpaid salary for 16 days worked in May 2017 as well as Kshs. 1,592.75 house allowance for the same period all totaling to Kshs. 1,452,292/-.
- d. Any other relief the court may deem fit to grant.

3. In response to the suit the Respondent filed a Statement of Response dated 24th May 2018. It avers that on the fateful day the Grievant was not at his workstation, and when questioned by his supervisor, one Margaret Wambui Mburu he responded in a derogatory manner by referring to her as "cucu" (grandmother). The supervisor then reported the incident to the manager who summoned the Claimant for questioning. The Respondent avers that instead of subjecting

himself to the manager's enquiry, the Grievant instead left employment. It is the Respondent's case that the Grievant was neither locked out nor denied an opportunity to be heard. Accordingly, it avers that no termination occurred and that the Grievant is not entitled to any of the reliefs sought, as there were no underpayments, overtime dues, or accrued leave.

4. At the hearing, the Grievant testified on his own behalf and adopted his witness statement dated 18th July 2018 together with his bundle of documents. He stated that what was perceived as idling was in fact part of his duties, namely supervising baking carts to ensure a smooth baking process. He testified that his attempt to explain himself was disregarded by the supervisor, leading to the report for insubordination. He further testified that, despite the intervention of the Assistant Manager, he was forcibly removed from the premises and never received any formal communication from the Respondent thereafter. He added that he was paid Kshs. 7,000/- at the end of May 2017 and that efforts at reconciliation were unsuccessful.

5. Upon cross-examination he stated that he joined the Claimant Union 1 month prior to the termination of his employment, even though there was no receipt for payment of union dues for February 2017. He further stated that he had been requested to serve a customer by his supervisor but he could not leave the dough unattended having already put it in the mixer. That marked the end of the Claimant's case.

6. On the Respondent's side the first defence witness was Mr. Gerald Mbugua (RW1), the Respondent's Mwiki Branch Manager. He adopted his witness statement dated 11th May 2018 as his evidence in chief. He also produced the documents in the list of documents dated 29th May 2018 as Rex 1-5. He stated that when he questioned the Grievant about the alleged abuse of his supervisor, the Grievant responded that his days of working under a woman's supervision had come to an end. RW1 testified that at this juncture he referred the Grievant to the General Manager, but the Grievant removed his apron, placed it on his desk

and stated that he was not behooved to work with the Respondent.

7. On cross-examination, RW1 conceded that he did not personally witness the exchange between the Grievant and the supervisor. He also acknowledged that employees, including the Grievant, reported to work as early as 6.30 am.
8. The second defence witness was Mr. James Ndungu Njai (RW2) the Respondent's General Manager. He, likewise, adopted his witness statement dated 11th May 2018 as his evidence in chief. He testified that the Grievant was not a member of the Claimant union and confirmed that he received a report regarding the incident from the branch manager. At this juncture the Respondent's case was closed and parties filed written submissions.

Claimant's Submissions

9. The Claimant framed three issues for determination, namely:
 - a. whether the Grievant's termination was unfair;
 - b. whether the Grievant is entitled to the remedies sought;
 - and
 - c. who should bear the costs of the suit.

10. As regards the first issue, the Claimant submitted that the Respondent failed to prove a valid and fair reason for termination as required under section 45 of the Employment Act. It contended that the allegation that the Grievant used derogatory language was not substantiated, as the supervisor to whom the remarks were allegedly directed was not called to testify. The Claimant submitted that the evidence of both RW1 and RW2 was of no probative value because they were not privy to the exchange between the Grievant and the supervisor. For this reason, they submitted that the Respondent had failed to discharge its burden under section 47(5) of the Employment Act of justifying the grounds for termination of employment. For this proposition reliance was placed on the case of **Swaleh David v Premier Cookies Ltd [2021] eKLR**. In support of the argument that RW1 and RW2's testimony amounted to hearsay reliance was placed on the case of **Isaac Lumumba Omega v Specialized Air Conditioning Ltd [2021] eKLR**, in which it was observed:

“The Respondent ought at least to have called the said Anita to give evidence in court since it is the conversation that the company mainly relied upon in their case for gross insubordination.”

11. The Claimant further submitted that the argument that the Grievant deserted duty also falls flat on its face. It submitted that the Respondent had not demonstrated that it made an effort to trace the grievant as is required in instances of desertion. It contended that the alleged phone calls by RW2 were not supported by call logs and were not pleaded in the witness statement. To buttress this point, it relied on **Ronald Nyambu Daudi v Tornado Carriers Ltd [2019] eKLR**, which underscored that an employer alleging desertion must demonstrate efforts made towards reaching out to the employee and notifying them of the possibility of summary dismissal. Further reliance was placed on **Inzofu v Ipress Limited [2023] eKLR**, which outlined that the employer must demonstrate that the employee absented themselves with no intention to go back to work. Moreover, it asserted that it defied logic for the Grievant to desert duty

then go ahead and report a workplace lockout the next day. With respect to procedural fairness the Claimant submitted that section 41 of the Employment Act was completely disregarded. He asserted that no show cause letter was issued and no disciplinary hearing took place. The Claimant relied on the case of **Matsesho v Newton [2022] KEELRC 1554**, which underscored that the employee must be: told what it is he is accused of; allowed a chance to defend himself; allowed the opportunity to call witnesses in support of his case; and informed of the decision taken by the employer to terminate the employee's services.

12. On the remedies sought, the Claimant urged the court to award the same as pleaded. It was submitted that the Grievant was entitled to one month's salary in lieu of notice in the sum of Kshs. 19,909.45, being the applicable minimum wage for an oven man under the Regulation of Wages (General Amendment) Order, 2017. The Claimant submitted that underpayment was uncontroverted, as the Respondent admitted paying Kshs. 17,500/- against the statutory minimum. Regarding overtime, the Claimant submitted that

the Grievant used to work from 6.30am to 8.00pm without overtime. It drew attention to the biometric register for 16th May 2017 produced in evidence which showed that he clocked in at 6.32am. It also highlighted RW1's testimony that employees reported to work at 6.30am and left as late as 9.00pm. Moreover, it urged the Court to draw an adverse inference against the Respondent given its failure to produce biometric records despite being the custodian thereof.

13. The Claimant further sought maximum compensation for unfair termination under section 49 of the Employment Act, submitting that the Grievant had served for approximately four years, lost his employment abruptly, and did not contribute to the termination. Reliance was placed on **Kenfreight (EA) Limited v Benson K Nguti [2019] eKLR**. Additionally, it was submitted that the claim for salary for 16 days worked in May 2017 was uncontroverted and should be allowed. In conclusion the Claimant urged the Court to allow the claim with costs.

Respondent's Submissions

14. The Respondent identified the issues for determination as whether the Grievant's employment was terminated by the Respondent, and if so, whether such termination was unfair within the meaning of sections 43 and 45 of the Employment Act, and whether the Grievant is entitled to the reliefs sought. On the question of termination of employment, the Respondent submitted that the Grievant voluntarily deserted duty. It asserted that the allegations of a lock out were unfounded as what happened did not meet the threshold of a lock out as envisaged in the Employment Act. Moreover, the Claimant submitted that the Grievant's conduct of returning to the workplace on 17th May 2017 to hand back his dust coat, demonstrated a clear intention not to resume duty. Additionally, it submitted that the Labour Conciliator's finding that there was no lock out negated the claim that the Grievant was denied access to the workplace.

15. It was further submitted that the Grievant failed to discharge the burden of proof under section 47(5) of the Employment Act. Reliance was placed on **Kenfreight (EA) Limited v Benson K Nguti [2019] eKLR**, where the Court

of Appeal held that an employee must first establish that termination occurred before the employer is called upon to justify it. The Respondent also cited the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) (Civil Appeal 240 of 2018) [2021] KECA 173 (KLR)** for the proposition that the burden of proving dismissal lies with the employee. Laying emphasis on desertion the Respondent submitted that no termination letter or evidence of a communicated dismissal decision was produced, nor was there evidence that the grievant reported back to work or sought clarification of his employment status. It asserted that the Claimant's action constituted a repudiatory breach of contract. In this regard, reliance was placed on the case of **Seabolo v Belgravia Hotel [1997] 6 BLLR 829 (CCMA)**, where desertion was defined as intentional abandonment of employment without intention to return. The Respondent further cited the case of **Felistas Acheh Alkatawa v Charles Peter Otieno [2018] eKLR**, where the Court held that desertion occurs when an employee absents himself without lawful cause and without communication, and **Stanley Omwoyo v Board of**

Management St. Peter's Mumias Boys High School

[2017]eKLR, where it was held that where an employee walks away and fails to resume duty, separation is attributable to the employee. On that basis, the Respondent submitted that the claim for unfair termination could not stand in the absence of proof of termination.

16. In the alternative, and without prejudice, the Respondent submitted that even if termination was to be found to have occurred, there existed valid and fair reasons. It asserted that the grievant's use of abusive language, defiance of authority, and refusal to comply with workplace hierarchy constituted sufficient grounds for summary dismissal under section 44(4)(c) and (e) of the Employment Act. The Respondent relied on the case of **Kenya Revenue Authority v Reuwel Waithaka Gilahí & 2 others [2019] eKLR**, where the Court of Appeal held that an employer must demonstrate valid and reasonable grounds for termination, and **CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] eKLR**, where the Court

emphasized the test of whether a reasonable employer would have taken the same action.

17. On procedural fairness, the Respondent submitted that the requirements under section 41 of the Employment Act, as elucidated in **Postal Corporation of Kenya v Andrew K. Tanui [2019]eKLR**, were inapplicable in the circumstances, as no termination occurred. It further submitted that even where procedural lapses are alleged, the Court must consider substantive justification, as affirmed in **Kenfreight (E.A.) Limited v Benson K. Nguti [2019]eKLR**.

18. Regarding the reliefs sought, the Respondent submitted that the claim for notice pay was untenable since notice is only payable where termination is initiated by the employer under section 35 of the Employment Act. As for compensation under section 49(1)(c) of the Employment Act, it was submitted that it was untenable as unfair termination did not occur. Reliance was placed on **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) (Civil Appeal 240 of 2018) [2021] KECA**

173 (KLR) [2015]eKLR. On overtime the Respondent submitted that it was not proved, as it was unsupported by attendance records, shift schedules, or written authorization. In this regard, reliance was placed on **CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] eKLR**, where the Court of Appeal held that special damages must be strictly proved. It was also asserted that part of the overtime claim was time-barred under section 89 of the Employment Act. On the claim for leave, the Respondent submitted that no evidence was adduced to demonstrate accrued and untaken leave under section 28 of the Employment Act. The claims for underpayment and wages for May 2017 were also disputed on the basis that no proper evidentiary foundation was laid and that the Grievant had been paid all dues for days worked, as confirmed during cross-examination.

19. As regards the Grievant's union membership the Respondent submitted that it was suspect. It highlighted the fact that the receipts were paid for after employment terminated and the serial numbers indicated that they were

written on the same day. In conclusion, the Respondent submitted that the evidence established voluntary desertion of employment, that no termination occurred, and that the Claimant had failed to discharge the statutory burden of proof under sections 43, 45, and 47(5) of the Employment Act. It further submitted that, in any event, valid and fair reasons existed for termination, and that the monetary claims were unproven and legally unsustainable. The Respondent therefore prayed that the claim be dismissed with costs.

Disposition

20. The question this Court has to answer is whether the Grievant deserted employment and if the Grievant has established a case against the Respondent for unfair/unlawful dismissal.

21. The Grievant left the employ of the Respondent in a huff. The evidence before the Court shows there was hubris in the Grievant resulting in his refusal to take instructions from a woman supervisor. The Grievant having left the employer's

premises in what amounts to desertion, what was the Respondent to do? Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. However, it is not enough for an employer to merely state that an employee has deserted duty. An employer alleging desertion against an employee must show the efforts it made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.

22. There was no evidence of an attempt to reach the Grievant who is said to have deserted. Purely on this score the Grievant would be entitled to recover the sum equivalent to two month's salary for the unfair and unlawful dismissal attributed to his alleged desertion.

23. As the Grievant was the author of his own misfortune, each party will bear their own costs. In the final analysis I enter judgment for the Claimant on behalf of the Grievant against the Respondent for

- a. 2 month's salary as compensation for the unfair and unlawful dismissal - Kshs 35,000/-.
- b. Interest on the sum in (a) above at court rates from the date of judgment till payment in full.
- c. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Kisumu this 18th day of March

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**