



**Moses v Mini Bakeries (NBI) Limited (Cause 145 of 2015)
[2023] KEELRC 572 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 572 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 145 OF 2015
DN NDERITU, J
MARCH 9, 2023**

BETWEEN

DAVID MAKORI MOSES CLAIMANT

AND

MINI BAKERIES (NBI) LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. In a Statement of Claim dated 18th May, 2015 and filed in court on 22nd May, 2015 through M. Korongo & Co Advocates the Claimant prays for: -

1. One month salary in lieu of notice
 2. Underpayments
 3. Leave for 7 days
 4. Gratuity for 6 years
 5. Compensation Section 49(1) c
 6. Costs of the suit to be borne by the Respondent
- Claims Arrangement
1. One month salary in lieu of notice.....19,667.10
 2. Underpayment.....71,425.60
 3. Leave for y years.....96,368.80
 4. Compensation: Section 49(1) c.....236,005.20



5. Gratuity..... 59,001.30
Grand Total Claims Kshs.482,264.00
2. Together with the statement of claim was filed a verifying affidavit by the Claimant and a bundle of documents in support of the claim. The Claimant also filed a witness statement dated 1st February, 2016 on 21st April, 2016 alongside a further list of documents dated 23rd March, 2016.
3. On 22nd June, 2015 the Respondent through Jones & Jones Advocates entered appearance and filed a memorandum of response to the claim on even date alongside a list and a bundle of documents. A witness statement by Ramadhan Noor (RW1) was also filed.
4. In its memorandum of response, the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
5. On 20th August, 2018 the Respondent appointed its Advocates now on record P.n. Khisa Advocates to act for it in this cause.
6. This cause came up in court for hearing on 19th May, 2022 when the Claimant (CW1) testified and closed his case. The defence was also heard on the same date when Ramadhan Noor (RW1) testified for the Respondent and the Respondent's case was closed as well.
7. Counsel for the parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant filed written submissions on 5th July, 2022 while Counsel for the Respondent filed on 8th July, 2022.

II.The Claimant's Case

8. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel, and the same is summed up as hereunder.
9. In his statement of claim, the Claimant pleaded that he was engaged by the Respondent in February, 2007 as a general worker for a month and then promoted to a slicing supervisor (machine assistant) and then by July, 2009 he was promoted to a salesperson a position he allegedly held till his dismissal on 17th February, 2015. He pleaded that he started with a salary of Kshs.353/= per day for the one month he worked as a general worker, then the pay was raised to Kshs.620/= when he was a slicing supervisor, and then Kshs.1,030/= as a salesperson until his termination. All the foregoing is pleaded in paragraphs 3 and 4 of the statement of claim.
10. However, in paragraph 5 of the statement of claim the Claimant pleads that he was on a monthly basic pay of Kshs.11,694.42 plus Kshs.3,508.39 in house allowance making a net of Kshs.15,203/=.
11. The Claimant pleaded that for the eight years that he worked for the Respondent he was underpaid and denied leave for seven of those years and that the Respondent failed and or refused to remit to NSSF deductions made from his pay.
12. In his oral testimony in court the Claimant stated that he was at first engaged as a general worker and later as a turnboy. He stated that he was a general worker from 2007 to 2013 and later a turnboy from 2013 to 2015. This testimony is a complete departure from the pleading in the statement of claim as per the foregoing paragraphs.
13. The Claimant admitted in his testimony that he was dismissed after he incurred a shortage of Kshs.23,000/= which he was not able to account for. He alleged that he had advanced the money



- to a cashier who later on left employment of the Respondent without repaying the same. For his misconduct the Claimant was issued with a show-cause letter which he admitted that he received and responded to. He thereafter received a letter of summary dismissal.
14. He stated that he did not steal any money from the employer and that he was not charged with theft or a related offence. He alleged that he was not taken through a disciplinary hearing before dismissal.
 15. In cross-examination the Claimant admitted that the letter of his appointment is dated 3rd September, 2013 and that prior to that date he was a casual employee but he admitted that he had no evidence in support of the casual employment.
 16. He admitted that as a turnboy he used to receive money in cash from customers which money he was supposed to remit to the cashier on daily basis. He alleged that he advanced the sum of Kshs.23,000/= to KEVIN, the cashier, without any records to that effect. He admitted that prior to this shortage he had incurred another shortage of Kshs.12,785/=. In his reply to the show-cause letter he admitted that he had applied the two sums of money to his personal use. He admitted that the show-cause letter was very specific and particular on how he had misconducted himself in misappropriating the aforesaid sums of money for personal use without permission or authority from the Respondent.
 17. On the basis of the foregoing the Claimant insisted that he is entitled to the reliefs sought in the statement of claim. The submissions by his counsel shall be considered alongside those of the Respondent's counsel at the determination section of this judgment.

III.The respondent's case

18. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel, as summarized hereunder.
19. The Respondent's case is that at no time was the Claimant engaged either as a slicing supervisor or as a salesperson. The evidence by RW1 is that the Claimant was summarily dismissed for putting to personal use the property of the Respondent (money in cash) and failing to account for the same.
20. This witness testified that the Claimant misappropriated Kshs.12,785/= at first and later Kshs.23,000/=, both in December, 2014. He stated that while the Respondent was able to recover the first amount by way of deductions from the earnings of the Claimant, it was noted that the Claimant was becoming habitual in his misconduct and hence the Respondent decided to issue him with a show-cause letter. He stated that the Claimant responded to the show-cause letter but upon consideration of all the aspects of the alleged misconduct, the Respondent decided to summarily dismiss the Claimant as the misconduct was gross.
21. He testified that while the Respondent had the option of pushing for criminal charges against the Claimant it decided not to do so notwithstanding that only Kshs.12,785/= was recovered. He testified that the Respondent decided to pursue the disciplinary process and the Claimant was lawfully and procedurally dismissed. He stated that the Claimant admitted to his gross misconduct in his reply to the show-cause letter and as such there was no need for a physical hearing as the correspondences exchanged were adequate to enable the Respondent arrive at a fair conclusion in the disciplinary process which culminated in the summary dismissal of the Claimant for gross misconduct. He stated that the appeal by the Claimant was found to have no merits and the same was dismissed.
22. RW1 stated that the Claimant was engaged by the Respondent in 2013 as a turnboy and issued with an appointment letter which he produced as an exhibit. The employment was to commence from 1st September, 2013 with a probationary period of three months. The probationary period was extended to 28th February, 2014 and the Claimant was confirmed as from 1st March, 2014 in the same position



- of a turnboy. The witness produced letters in support of the foregoing evidence alongside a copy of employment identity card indicating that the Claimant was employed as a turnboy and not in any other capacity.
23. The witness produced statements from NSSF showing that the Respondent remitted deductions as per the law. He stated that the Claimant worked with the Respondent from September, 2013 to March, 2015.
 24. He stated that as a turnboy who rode with the driver in the delivery vehicles the Claimant was authorized to collect money from customers and submit the same to the cashier upon return to the depot. He stated that under no circumstances was the Claimant allowed to keep money overnight or to apply the same to personal use.
 25. It is on the basis of the foregoing that the Respondent asked that the Claimant's cause be dismissed with costs. The submissions by Counsel shall be considered in the succeeding parts of this judgment.

IV. Issues For Determination

26. While Counsel for both parties had filed a statement of agreed issues for the determination by this court, after careful and thorough scrutiny of the pleadings filed, the oral and documentary evidence tendered from both sides, and the submissions by counsel for both parties, the court identifies the following issues for determination –
 - a. What was the nature of the employment relationship between the Claimant and the Respondent?
 - b. Was the dismissal of the Claimant by the Respondent wrongful, unfair, and unlawful?
 - c. If (b) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - d. Who meets the costs in this cause?

V. The Employment Relationship

27. The terms and conditions of employment of the Claimant by the Respondent are somehow in dispute. The Claimant alleges that he worked for the Respondent as a casual from 2007 to 2013 before he was formally absorbed in on contractual basis. He did not avail any evidence in support of this argument. He did not give any evidence of pay or any other evidence in support of that allegation. Further, the Claimant alleged that he was at first engaged as a general worker and later on as a slicing supervisor and subsequently as a salesperson. All this was not supported with concrete evidence and in his oral testimony he departed from his pleadings and stated that he was actually employed as a turnboy.
28. The foregoing evidence, especially the contradictions therein, goes to indicate that the Claimant was either not sure or certain of his employment relationship with the Respondent or that he deliberately set out to tell untruth or he was out to mislead this court. His statement of claim alleges that he was at some point a slicing supervisor and at some other time a salesperson yet he has no evidence whatsoever in support of the same.
29. On the other hand, the Respondent is categorical that the Claimant was engaged as a turnboy and not in any other capacity, and the documents in support of that position were availed through RW1 as alluded to in the preceding part of this judgment.
30. In the circumstances, and based on the evidence availed, this court concludes and holds that the Claimant was only engaged by the Respondent as a turnboy as per the undisputed letter of



appointment dated 3rd September, 2013. There is no evidence whatsoever of any engagement of the Claimant by the Respondent at any other time and or in any other capacity other than as contained in the said letter of appointment as per the evidence from the Respondent. The first issue is hence declared in the foregoing terms, that the terms of employment of the Claimant by the Respondent is as per the letter of appointment alluded to above and not any other.

VI.The Dismissal

31. The Respondent commenced disciplinary action against the Claimant vide a show-cause letter dated 30th January, 2015. For avoidance of doubt the said letter is reproduced as follows –

Memo

To : David Makori Moses

Turn Boy

Nakuru Branch

Payroll No : 3075

From : Legal & Administration

Department

Date : 30th January 2015

Re: Notice To Show Cause Why You Cannot Be Summarily Dismissed

The Management makes reference to the above subject matter after receipt of a report that you are liable for gross misconduct.

The Report indicates that on the 19th and 22nd December, 2014 you apparently diverted Company cash Kshs.12,785/= and Kshs.23,000/= respectively without prior authorization and/or approval. That later and on enquiry, you admitted to have taken the cash for personal issues and subsequently sought it to be recovered in installments via recovery from the salary. This clearly confirms that the money was not lost but deliberately taken with ulterior motives and to be recovered via the deduction system as if it was a genuine short.

As you must be aware, it is a serious breach of the regulations governing cash handling to dishonestly take sale proceeds for personal issues and then seeking to be repaid via deductions under the pretext that it was a route short. Indeed, apart from being dishonest, the action amounts to a crime of stealing by servant.

In this regard, the Management is satisfied that you acted dishonestly in the course of duty which amounts to gross misconduct that attracts severe action including Summary Dismissal. Accordingly, you are now hereby required to submit your defence within four (4) days explaining why you cannot be dismissed summarily for dishonestly and fraudulently diverting Company cash then pretending that it was a route short or loss.

Kindly sign date and return the attached copy of this memo to acknowledge receipt and for our records.

Thomas W. Mwaura

Legal & Administration Manager

Name: David Makori Moses Sign: signed date 04/2/15



CC: Personal file

713/jwn

(17)

Issued on 04/02/2015

Signed

4/2/15

32. The above show-cause letter is self-explanatory and the Claimant responded thereto vide a letter dated 5th February, 2015. For completeness the said response is in the following terms –

David Makori Moses

Box 362

Sare Awendo

5th February 2015

To:

Legal Administration Department

Mini Bakers Ltd

Box 17592

Nairobi

Dear Sir,

RE: Letter To Show Cause Dated 30.01.2015 Why I Should Not Be Summarily Dimissed

Reference is made to the above subject matter that on the mentioned dates I diverted cash of Kshs.12,785 and Kshs.23,000 respectively. I wish to reiterate as follows; that prior to the mentioned date the cash of Kshs.12,785 was genuine short I incurred while I was on duty. This matter was reported to the management and the same was agreed to be recovered from my salary via deduction system in form of installments. The other cash of Kshs.23,000 was not remitted to the company cashier for the reason that when I had a personal problem which I notified the management verbally they agreed and allowed me to convert the cash for my personal use then we agreed the same to be recovered by way of deductions from my salary. Thus I signed a deduction form which the company holds as an employee who has worked for the company for a period of Nine(9) years and who has been in good relationship with the company I did not therefore act with any in motive intended at misappropriating the cash as alleged.

Therefore sincerely submit that since my agreement with the management to recover the cash has started to effect via deductions from my salary the same should remain in force until the debt is fully settled. I do also promise that if the company gives me an opportunity to proceed with my duties as before I shall be diligent to safeguard the safety of the cash collected on behalf of the company.

Yours faithfully

David Makori Moses



Signed 5/2/15

33. The Claimant admitted to the loss and or misappropriation of the sums of money mentioned. He stated that the sum of Kshs. 12,785/= was a genuine shortage in the course of his work and that the same had been agreed to be recovered from his pay, and the same was indeed recovered, while the sum of Kshs.23,000/= had been diverted to his personal use but he alleged that he had informed the management. No evidence of such notice to the management and or permission obtained was exhibited by the Claimant and the Respondent is categorical that no such request was made and or granted for the Claimant to apply the money to personal use.
34. Upon considering the foregoing exchanges, the Respondent decided to summarily dismiss the Claimant and that decision was communicated vide a letter of summary dismissal dated 17th February, 2015. The Respondent concluded that the Claimant had either misappropriated the cash, negligently lost the same, or stole the same, and hence he was unable to account for it. It was concluded that the Claimant was guilty of gross misconduct and he was hence summarily dismissed as from 22nd February, 2015.
35. The Claimant appealed the summary dismissal pleading that he had agreed to repay the money lost by way of monthly deductions from his pay. The appeal was dismissed and the summary dismissal was upheld as communicated by the Respondent to the Claimant vide a letter dated 2nd March, 2015. The Respondent maintained that the Claimant was guilty of gross misconduct to which he had expressly admitted.
36. It is the said summary dismissal that the Claimant is now challenging as wrongful, unfair, and unlawful. The Claimant, in not so few words, is alleging that he was denied both substantive and procedural fairness.
37. In her submissions counsel for the Claimant, Miss Juma, takes the view that since the Claimant had admitted to the loss of the cash and or misappropriation thereof and agreeing to the same being recovered from his salary, the Respondent ought not to have taken the disciplinary action. Counsel also argues that the Claimant was not given an opportunity to be heard. Counsel is of the opinion that the Respondent had no reason to summarily dismiss the Claimant and that the Respondent failed to meet the provisions of Sections 41, 43, and 45 of the *Employment Act* (the Act) and Articles 41 and 47 of *the Constitution*. Counsel submits that the Claimant was denied both substantive and procedural fairness. Counsel has cited *Rashid Jeneby V Prime Bank Limited* (2015) eKLR and *Sikuku Nzuvi Ngii V Gacal Merchants Ltd* (2015) eKLR in support of this proposition.
38. On the other hand, counsel for the Respondent, Ms Khisa, has submitted that the conduct of the Claimant, which was in any event voluntarily, unambiguously, and unequivocally admitted by the Claimant in his response to the show-cause letter, amounted to gross misconduct for which the Respondent rightfully and lawfully and summarily dismissed the Claimant based on Section 44(4)(g) of the Act. Counsel submitted that the fact that the Claimant was not charged in a criminal court for the offence of theft or a related charge does not mean that the Claimant was not guilty of gross misconduct that attracted the summary dismissal. Counsel has cited *Amos Kitavi Kivite V Kenya Revenue Authority* (2020) eKLR and *Kioko Muindi V United Aryan (EPZ) Limited* (2022) eKLR to buttress her arguments on the foregoing issues. Counsel has also cited *Kenya Power & Lighting Company Limited V Aggrey Lukorito Wasike* (2017) eKLR in support of the argument that while an employer has a duty to justify the reason for a dismissal the overall burden of proving that the dismissal was wrongful and unlawful still rests with an employee.



39. Counsel has submitted that the Claimant was properly, duly, and fairly heard by way of the correspondences exchanged between the parties from the show-cause letter, the response thereto, the letter of summary dismissal, the appeal to the dismissal, and the letter dismissing the appeal. Counsel submits that in the circumstances of this matter there was no need for a physical hearing as the Claimant readily admitted to the gross misconduct as framed by the Respondent in the show-cause letter. In that regard counsel has cited *Judicial Service Commission & Another V Gladys Boss Shollei & Another* (2012) eKLR. Further Counsel submitted that as it was held in *Jeremiah Gitau Kiereini V Capital Markets Authority & Another* (2013) eKLR the Claimant was afforded a fair opportunity to be heard considering the entire circumstances of this matter.
40. The question on what constitutes fair hearing, both in substance and procedure, in employment matters is now fairly settled – See *Mary Chemweno V Kenya Pipeline Company Limited* (2014) eKLR, *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, and *Janet Nyandiko V Kenya Commercial Bank Limited* (2017) eKLR.
41. The circumstances, facts, and evidence in this cause are as set out in the foregoing paragraphs of his judgment. The Claimant failed to account for money he collected from customers for and on behalf of the Respondent. He admitted to the misconduct, which was evidently caused either by his neglect of duty or misappropriation or theft on his part, and he undertook to make good the first loss of Kshs.12,785/= by way of deductions from his salary. Soon thereafter the Respondent discovered that the Claimant had misappropriated and or failed to submit or account for a further sum of Kshs.23,000/= . The Respondent then issued the Claimant with a show-cause letter and in response thereto the Claimant admitted the shortage and stated that he had actually put the money to personal use. After considering the said response the Respondent summarily dismissed the Claimant and the subsequent appeal was dismissed.
42. This court has carefully and thoughtfully considered the evidence adduced by both sides and concludes that the Claimant was either too negligent in performance of his duty, so as to lose and fail to account for the said sums of money, or that he committed a criminal offence against and to the detriment of his employer or employer’s property – See Section 44(4)(c) & (g) of the Act. This court takes the considered view that in the entire circumstances of this matter the Respondent had reasonable and sufficient grounds upon which to summarily dismiss the Claimant as it did. In terms of substance the Respondent had good reason(s) upon which to found the summary dismissal. The Claimant was the author of his own misfortune for taking, misappropriating, and or failing to account for monies he had received for and on behalf of the Respondent in the course of his employment.
43. In terms of the procedure this court takes the considered view that the Claimant was given a reasonable opportunity to be heard and that he was indeed heard through the correspondences exchanged. Having admitted that he indeed converted the said sums of money into his personal use there was indeed nothing else to be heard. Even if he had been invited to a physical hearing, any oral testimony in such a hearing could not override the written admission that the Claimant had already submitted in admission of the misconduct in his response to the show-cause letter. This is the gist and ratio in the *JSC V Shollei & Others* (Supra) and *Jeremiah Gitau Kiereini V Capital Markets Authority* (Supra).
44. It is in the considered view of this court that even if the Claimant had been invited for a physical hearing, based on the facts and circumstances as set out and analyzed above, nothing would have changed. A hearing does not of necessity imply a physical hearing. It is about an opportunity for the employee to present his defence to the allegations made against him. This court is of the view and holds that the Claimant was afforded and accorded a fair and reasonable opportunity to present his defence and he



was thus heard within the meaning and context of the provisions of the law and more so Sections 41, 43, 44, and 45 of the Act.

45. In the circumstances and in view of the foregoing this court finds, concludes, and holds that the Claimant was afforded and accorded both substantive and procedural fairness leading to his summary dismissal.

V. Reliefs

46. Having held that the Claimant was fairly and lawfully dismissed summarily for gross misconduct, this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
47. Prayer one (1) is for one-month salary in lieu of notice. This court has found that the summary dismissal of the Claimant by the Respondent was lawful and procedural. In those circumstances the Respondent was not under any legal obligation to issue the Claimant with a notice and for that reason this prayer is denied.
48. Prayer 2 is for underpayments. The allegation by the Claimant is that he was working as a salesperson and that the salary paid was below the minimum Gazette or Legal Notice wages. The evidence and the finding of this court is that at no time did the Claimant work as a salesperson and for the entire period of employment he was engaged as a turnboy. This prayer must fail. In fact, it has been demonstrated by counsel for the Respondent that the Claimant was actually overpaid for his services as a turnboy based on the negotiated CBA and the applicable Legal Notice.
49. Prayer 3 is for leave pay for 7 years. There is no evidence that the Claimant raised this issue with the employer at anytime in the course of his employment. In any event, it has been found that the Claimant worked for the Respondent for the period from 1st September, 2013 to 22nd February, 2015 when he was summarily dismissed. The Respondent availed records which show that the Claimant took leave of 26 days for the completed year between 2013 and 2014. This prayer must fail as well.
50. Prayer 4 is for gratuity for six years. This prayer has no merits at all. The Claimant's period of employment has been noted in the foregoing paragraph. If any gratuity was payable it would only be for the period worked of less than two years. Gratuity is not a right and is only payable upon agreement between employer and employee or as may be provided for in the terms of the contract – See– *Pathfinder International Kenya Limited V Stephen Ndegwa Mwangi* (2019) eKLR, *Bamburi Cement LTD V Farid Aboud Mohamed* (2016) eKLR, and *H. Young & Company EA Limited V Javan Were Mbago* (2016) eKLR.
51. Prayer 5 is for compensation under Section 49 of the Act. No compensation is payable as the Claimant was fairly and lawfully dismissed summarily for gross misconduct as held in another part of this judgment.

IV.Costs

52. This court could easily have granted costs of this cause to the Respondent had it not been for the consideration that the Claimant may not have been properly advised on the merits and demerits of his cause before filing the same. A litigant is not always equipped with the legal knowledge necessary to weigh the strength of a cause before filing the same in court. It is the duty of counsel to carry out a trial-advocacy or mock-trial before filing a cause in court. This court wishes to sound and signal a strong warning that in future the general principle of costs-follow-event shall apply and the losing party shall, in any event, meet costs of litigation. However, for all the foregoing reasons this court orders each party to meet own costs in this cause.



V. Disposal

53. In final disposal of this cause, this court issues the following orders: -

- a) A declaration be and is hereby issued that the summary dismissal of Claimant by the Respondent was fair and lawful.
- b) This cause is hereby dismissed in its entirety and each party ordered to meet own costs.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU

THIS 9TH DAY OF MARCH, 2023.

DAVID NDERITU

JUDGE

