



**Ireri v New Kenya Co-operative Creameries Ltd (Cause 113 of 2017)
[2023] KEELRC 1049 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1049 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 113 OF 2017
NJ ABUODHA, J
APRIL 28, 2023**

BETWEEN

JOSEPHINE GICUKU IRERI CLAIMANT

AND

NEW KENYA CO-OPERATIVE CREAMERIES LTD RESPONDENT

JUDGMENT

1. The Claimant herein through her memorandum of claim filed on 24th May, 2016 alleged among others that she was at all material times an employee of the respondent working as a sales person and doubling as a driver since 2nd of April, 2007 until 4th September, 2013 when she was suspended from service in breach of the *Employment Act*.
2. The Claimant averred that on 19th August, 2013 while on duty she was arrested and detained at Eldoret Police Station through the instigation of her employer on allegations of theft by servant. She was later arraigned in court over the said charges in Eldoret Criminal Case Number 3345 of 2013. The charges were later on dismissed when the Claimant was acquitted under Section 215 of the Criminal Procedure Code. The claimant further averred that during the pendency of the criminal case, the respondent suspended her and eventually dismissed her from employment.
3. The claimant contended that as a result of suspension and dismissal, she suffered in her reputation and was put to considerable harm and anxiety. The claimant therefore sought compensation in the sum of Kshs.13,276,803 as detailed in the statement of claim.
4. The respondent on its part pleaded that the claimant's suspension was within the law and the *Constitution*. According to the respondent, the claimant was given an opportunity to be heard and explain herself concerning the complaints raised against her which she failed to do adequately. The respondent further averred that it had every justification in dismissing the claimant from employment



following the events that took place on the material day hence the suspension and eventual dismissal was lawful and procedural.

5. The respondent averred that the investigation, arrest and prosecution of the claimant was entirely conducted by the police hence the respondent was a stranger to the averments in paragraph 6 of the statement of claim.
6. Concerning claim for basic pay and house allowance, the respondent stated the same were not payable and was a complete misapprehension of the law and terms of employment.
7. At the trial, the claimant informed the Court that she was relying on her witness statement recorded on 28th May, 2016 as her evidence in chief. She further relied on the documents filed with the claim.
8. According to the claimant, she was dismissed in October, 2013. Prior to her dismissal, she was arrested and charged with the offence of theft by servant. She was accused of stealing powdered milk. According to her, there was no powdered milk in the store at the time. She was acquitted of the charges in October, 2015 however, she was dismissed during the pendency of the criminal case. She felt the dismissal was unlawful and that she suffered anxiety and lost daily earnings.
9. In cross-examination, she stated that she was a saleslady cum driver and her responsibility was selling milk. She however, stated that her appointment letter did not state she was also to serve as a driver.
10. It was her evidence that she was suspended in July, 2013 and the suspension was to allow for investigation. She was however never called upon to respond to the allegations in the suspension letter. She appealed against the suspension stating the matter was on going in Court. It was further her evidence that she was invited for hearing and that she attended the hearing.
11. Concerning leave, it was the evidence that she went on leave during her employment. It was further her evidence that she Was never paid her half salary during the suspension.
12. The claimant's second witness informed the Court that he was called Erick Kamau and that he used to work for the respondent in Eldoret. He started as a General Clerk and later became a Machine Operator. He recorded a statement on 5th October, 2021 and relied on the same as his evidence in chief. He produced the storekeeper record and powdered milk register and stated they were charged together with the claimant. According to him, the milk they were charged with stealing were coded as 1006 and 1008 the former were ten cartons and the latter were two cartons. They were both full cream powdered milk. The theft was alleged to have occurred on 9th July, 2013. According to him, there were no such milk in store. His role was in the factory where he repackaged milk while the claimant was in sales.
13. It was his evidence that the orders were placed to the Factory Manager and forwarded to the depot for repackaging. On 9th July, 2013, milk code numbers 1006 and 1008 that were allegedly stolen were not in stock hence the allegation of theft was false.
14. In cross examination, he stated that he recorded a statement and that he started to work as a General Clerk and later became machine operator that was why he had the records.
15. The respondent's first Mr. Michael Mukopa informed the Court that he worked for the respondent as Industrial Relations Manager. He confirmed that the claimant was the respondent's employer. According to him, the claimant was involved in the loss of twelve cartons of milk. Investigations were conducted at the conclusion of which the claimant was suspended and issued with a show cause letter. She was later invited for a disciplinary hearing but she never attended. He further stated that the claimant never responded to the show cause letter. According to him, the claimant's conduct showed guilt. He further stated that the claimant was charged in a criminal case over the issue.



16. In cross examination, he stated that he never participated in the investigations and that it was done by the security officers.
17. Asked about the powder repackaging register, he stated that he did not know how to interpret the same and that the security officers would interpret the same. According to him, the document was prepared by the supervisor and that Kamau (CW2) did not prepare the same.
18. Concerning disciplinary hearing, he stated that the claimant was invited on 19th December, 2013 and was to appear on 23rd December, 2013. The letter was served on her through Eldoret Office. He further stated that the disciplinary proceedings took place during the currency of the criminal proceedings.
19. The respondent's second witness, Joseph Odhiambo stated that he worked for the respondent as a Security Manager and that he adopted his statement recorded on 21st May, 2018 as his evidence in chief.
20. According to him on 19th July, 2013 the respondent received a report that twelve cartons of milk had been stolen and the claimant was a suspect. The report was from one Joseph Opiyo from Bedrock Holdings. The report was dated 13th July, 2013.
21. According to Odhiambo, they confirmed that twelve cartons were given to the claimant without any documentation. The claimant asked one Chesire to collect some cartons of milk at Sosiani. The cartons were not in the delivery book.
22. In cross-examination, he stated that they checked to ensure the stocks allegedly stolen were in stock and found they were in stock. They used the store keepers' record for Dried Whole Milk and Powdered Milk Repackaging Register. The storekeeper's record was kept by CW2 (Mr. Kamau), he also kept the Repackaging Register. The twelve cartons were there but because they were stolen, they could not be in the register.
23. It was his evidence that before repackaging, Erick would requisition powdered milk from the main store. Kamau (CW2) was in charge of the main store. The claimant was stationed at the Eldoret Depot and Sosiani and Eldoret were on different compounds.
24. Requisitions from the Depot were done by the claimant. She was the one who dealt with the market. He stated that he was not aware whether the claimant requisitioned for milk code 1008 and 1006.
25. According to him, Opiyo raised a red flag when he noted the twelve cartons. He asked whether the excess cartons should be detained or the authorities informed about it. It was his evidence that the extra twelve cartons were not detained and that was an omission by the guards. The guards were to verify the contents of the vehicle and the documents as it left the depot. The guests noted the variance and which was why Opiyo raised the alarm. Vehicles were not supposed to leave with excess products. It was further his evidence that no one except the claimant was accused of the extra cartons and further that Opiyo paid for the products. He paid the claimant in this case but the cash was never receipted.
26. The respondent's 3rd and final witness Ms. Nyathira Muthuma informed the Court that she worked for the respondent in the legal department and that she recorded a witness statement on 16th June, 2016 which she adopted as her evidence in chief.
27. According to her in 2013, a report was received over the loss of twelve cartons of milk. The claimant was implicated in the loss. Internal investigations were conducted and thereafter the claimant and others were taken through disciplinary process. It was found that claimant had colluded with other staff to steal the twelve cartons. The committee recommended the termination of the claimant's service.
28. In cross-examination she stated that the claimant was acquitted of the criminal charges.



29. Regarding disciplinary hearing, she stated that the claimant was invited on 19th December, 2013 for a hearing scheduled for 23rd December, 2013. There was only one hearing which the claimant never attended. A resolution was passed to re-invite the claimant for another hearing but from the record, there was no re-invitation. According to her, the re-invitation was a prerogative of the respondent.
30. The Court having summarized pleadings and evidence as above becomes concerned with the question whether both parties have discharged their legal and evidentiary burden of proof as provided under Section 47(5) of the *Employment Act* which places the burden of proof that an unfair termination has occurred on the employee while the burden of proof of reason or justification for termination is on the employer.
31. The claimant herein was accused of stealing some twelve cartons of milk. According to the respondent, the milk was removed from the store to the factory and eventually out of the respondent's premises without the required documentation. The milk was eventually sold to one Mr. Joseph Opiyo of Bedrock Holdings who allegedly paid for the same in cash and was not issued with any receipt.
32. The claimant was subsequently suspended and issued with a show cause letter. She never responded to the show cause letter. Further, she was invited for a disciplinary hearing which she never attended. Concurrently, with the disciplinary with the disciplinary process, the claimant underwent prosecution for the offence of theft but was acquitted of the same at the conclusion thereof.
33. According to the claimant, she never stole any milk and that the alleged category of milk was never in stock at the time she was alleged to have stolen the same and that the category of milk alleged to have been stolen had been out of stock for a while.
34. An allegation of theft is a serious one and whereas the evidence at the disposal of an employer may not be sufficient to sustain a conviction on criminal trial, it desirable that it be such evidence that barely misses the threshold of proof in criminal trial.
35. The respondent informed the Court that the alleged stolen milk were detected by the guards at the gate who contrary to procedure neither detained the milk nor sought relevant authority for them to leave the respondent's premises. It was further alleged that Mr. Joseph Opiyo was the one who raised a red flag when the milk was allegedly sold to him by the claimant in cash and a receipt not issued. The Court notes that neither the guards on material date nor Mr. Opiyo were called to appear either before the disciplinary panel or before the Court to vouch for these serious allegations. Further, it was not documented or tendered in evidence, what action the respondent took against the guards concerned for failing to secure the respondent's property when they allowed extra cartons of milk to leave the respondent's premises without authority. To this extent, the Court is not persuaded that the respondent has discharged the legal and evidentiary burden cost upon it by Section 47(5) of the *Employment Act*. On this alone, the Court finds and holds that the termination of the claimant's service was unfair within the meaning of Section 45 of the *Employment Act*.
36. Regarding compensation, the claimant made a claim for special damages which she particularized as basic pay and house allowance from September, 2013 to October, 2015, annual leave for two months and retirement claim. These totaled to approximately Kshs.13,276,000.
37. It is a cardinal rule of evidence that special damages must be specifically pleaded and strictly proved. The claimant while pleading these heads of claim as special damages never went beyond that to show by way of any documentation or oral testimony that she was entitled to the claims she was making.
38. On the issue of retirement claim, the claimant seeks compensation up the year 2041. A Court of law should be wary of making any compensation regarding salary up to retirement because employment



like any other contract can come to an end prematurely due to several factors such as death, resignation or termination by either party. It is therefore not guaranteed that one would work until retirement. From the foregoing reasons, these heads of claim made by the claimant are hereby disallowed.

39. Under Section 49(1)(c) as read together with Section 50 of the *Employment Act* where in the opinion of the Court a termination of a contract of an employee is unjustified the court may order an employer to pay an employee the equivalent of a number of months' wages or salary not exceeding twelve months based on gross monthly wage or salary of the employee at the time of dismissal. As observed and held above, the accusations against the claimant were of serious nature. They imputed a criminal offence on her yet the evidence presented before the Court did not sufficiently disclose the claimant's culpability to warrant a termination. The Court therefore is of the view that the prosecution and termination of the claimant's service was too harsh in the circumstances.
40. The Court therefore finds that this is a proper case to award full compensation of twelve months' salary. The Court therefore awards the claimant as follows:
- a. One month's salary in lieu of notice Kshs.40,189.00
 - b. Twelve months' salary as compensation for unfair termination Kshs.482,268.00
Total Kshs.522,457.00
 - c. Costs of the suit and interest.
 - d. Items (a), (b) shall be subject to taxes and statutory deduction.
41. The Court sincerely regrets and apologizes for the delay in the delivery of this judgment long after conclusion of the hearing. The hearing was concluded on 4th May, 2022 and matter set for mention on 13th June, 2022 for allocation of judgment date. For some reason, the Court may not have been sitting or the file was not brought to the attention of the Court. The Registry staff ended up albeit mistakenly filing away the file creating the delay in the delivery of the judgment.
42. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF APRIL, 2023

ABUODHA J. N.

JUDGE

In the presence of:-

**for the Appellant

** for the Respondent

