



REPUBLIC OF KENYA



KENYA LAW
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**Sang v Majjid Al Tuttaim (Cause E059 of 2021)
[2023] KEELRC 3119 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3119 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E059 OF 2021
DKN MARETE, J
NOVEMBER 22, 2023**

BETWEEN

PATRICK KIPYEGON SANG CLAIMANT

AND

MAJJID AL TUTTAIM RESPONDENT

JUDGMENT

1. The matter commenced vide a Memorandum of Claim dated 4th January, 2021. The issues in dispute are herein cited as;
 1. Unpaid leave days for 3 years.
 2. Payment for breach of contract
 3. One month salary in lieu of notice
 4. Payment for service.
2. The Respondent in a Memorandum of Response dated 19th December, 2019 denies the claim and prays that it be struck out or dismissed with costs.
3. The claimant's case is that on or about 7th March, 2017 he was employed by the Respondent as a Stocker-Delicatessen Driver at a gross salary of Ksh.24,500.00.
4. The claimant's further case is that he served dedicatedly, loyalty, and diligently until the 8th April, 2020 when his employment was terminated without regard to procedure. This was on ground of the presence of live cockroaches in the food display which found their way into packed food.
5. The Claimant further avers that he was taken through a sham, unprocedural and pre-determined, disciplinary hearing and as today not been paid for service or severance pay.



6. The claim thus;
 - a) Payment for service $12,250 \times 3 \text{ years} = 36,750/=$
 - b) One month salary in lieu of notice = 24,500/=
 - c) Unpaid leave days for 19,788 x 3 years = 59,364/=
 - d) 12 months salary for breach of contract 292,800/=
7. He prays as follows;
 - a) The sum of Ksh.413,414 = particularized in paragraph 14.
 - b) Compensation for delay of payment
 - c) Costs of this suit.
 - d) Interest on (a) (b) & (c) above at court rate.
 - e) Any other or further relief as this Honourable court may deem fit and just to grant.
8. The Respondent as aforesaid denies the claim.
9. The Respondent in such denial of paragraph 5 of the claim posits that the claimant was paid a sum of Ksh.531,498.00 being full and final payment in accordance with the claimant union subsisting CBA. This was the legitimate amount under the CBA that was effective on 1st July, 2013.
10. Her further case is as follows;
 - i) The Respondent entered into a Collective Bargaining Agreement with three (3) staff unions represented by UASU, KUSU and KUDHEIHA.
 - ii) Page 15 of the collective Bargaining Agreement, under the title, "Duration and Effective Date of Agreement", provides that, "the Implementation date of this agreement shall be with effect from July 1, 2015.
 - iii) The computation of gratuity cannot be retrospectively calculated, as it would prejudice the Respondent.
 - iv) The Claimant has erroneously computed his gratuity and/or misinterpreted the Collective Bargaining Agreement to suit his circumstance.
 - v) The Claimant's computation of gratuity is a stark departure from the terms of the Collective Bargaining Agreement that he seeks to peg his claim on.
 - vi) The claimant was paid all their due wages for the years worked.
11. In the penultimate the respondent avers that the Claim is scandalous, frivolous and vexatious as it does not disclose any reasonable cause of action in law and the Respondent shall therefore apply for it to be struck out.
12. The Issues for determination therefore are;
 1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Claimant is entitled to the relief sought.



3. Who bears the costs of this suit.
13. The 1st issue for determination is that whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The claimant submits that his termination of employment was unfair in that he was not in-charge of fumigation in the premises. Again, there is no proof whatsoever that the claimant parked the life cockroach. It must have found its way into the wrapped in food in display.
14. The claimant further submits to section 47(5) of *Employment Act*, 2007 and as such that the termination of employment was unfair as the employer fails to prove a valid reason and fair procedure in his termination. No evidence was adduced to prove that the Claimant was responsible for the cockroach in the food. Its presence in the food and display remain speculative.
15. Section 47(5) comes out thus;
- For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
16. The Respondent's case is that he had valid grounds to dismiss the claimant. It is her case that at the material time, the claimant was responsible for packaging the foods that were on the display. Being well aware of the Respondent's Hygiene and Food Safety Policy he was duty bound to adhere to this and maintain high hygiene standard at the work place. This he failed to do so.
17. The Respondent also partook all appropriate disciplinary procedures in the termination of employment of the claimant. He was issued with a Notice to Show cause to which he replied and was subjected to the disciplinary hearing where he attended accompanied by two employee representatives. All this time, and even at the hearing he admitted his role in packing of sausages. This led to his termination of employment with Respondent.
18. The Respondent brings out a more succinct case in favour of lawful termination of employment. He derides the Respondent's case of the being a blemish free worker and submits that he had had many previous cases of carelessly and negligently performing duties. He cannot therefore complain.
19. I agree. The Claimant cannot be heard to say that he was not awarded with valid reasons for his dismissal. He also has no justification for pleading a case of unfair and unprocedural termination of employment when he was taken through the realms of section 41(1) and (2) of the *Employment Act*, 2007. His case therefore fails for lack of substantiation. I therefore find a case of lawful termination of employment and hold as such.
20. The 2nd issue for determination whether the claimant is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment, he becomes disentitled to the relief sought.

DELIVERED, DATED AND SIGNED THIS 22ND DAY OF NOVEMBER 2023.

D. K. NJAGI MARETE

JUDGE

Appearances:

Mr. Mberere instructed by Ahmed Mberere & Company Advocates for the Claimant.

Mr Makori instructed by Hamilton Harrison & Mathews for the Respondent.

