



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 778 OF 2015**

**TOM MWAMBEZI GAMIMBA.....CLAIMANT**

**- VERSUS -**

**TUSKER MATTRESSES LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 18<sup>th</sup> February, 2022)

**JUDGMENT**

The claimant filed the memorandum of claim on 15.10.2015 through S.O Oguk & Company Advocates. The amended memorandum of claim was filed on 13.11.2017 through Jackson Muchiri & Associates Advocates. The claimant was employed by the respondent on 01.07.2008 as a shop assistant at the Magic Nairobi Branch. His case is that he served diligently and he was promoted to a cashier as per the letter dated 05.03.2012. He was transferred to Bandari Branch in Mombasa and continued to serve as a cashier. By the letter dated 05.08.2015 the respondent conveyed that between April to June 2015, the claimant fraudulently voided 31 transactions amounting to Kshs. 5, 620.00 on different dates and leading to substantial losses. The letter invited the claimant to the head office on 07.08.2015 to record a statement on the matter. The claimant wrote a statement explaining how transactions are voided being that where a transaction is not completed like where a customer's card fails, the claimant called for authorised persons (the manager, assistant manager, chief cashier, or assistant chief cashier under his supervision) and the claimant used the person's pass word to void the transaction after proper explanation and all goods in issue taken to a safe place. The claimant stated that the allegations against him were therefore fraudulent.

By the letter dated 17.08.2015, the claimant was invited to appear before the respondent's disciplinary committee fixed for 27.08.2015 at 10.00am and to be held at the head office. The letter advised the claimant about his rights at the hearing including to be represented by a fellow employee; to cross examine the respondent's witnesses; to testify in his own defence; to call witnesses to support his case; and to access all relevant information intended to be used as evidence by the respondent. The disciplinary committee convened as was scheduled and the claimant explained himself. The claimant has exhibited the minutes of the disciplinary hearing.

By the letter dated 28.08.2015 the respondent terminated the claimant's employment effective 27.08.2015 on gross misconduct namely, fraudulently voided 31 items worth Kshs. 5, 620.00 as a cashier at Bandari Branch. The termination letter stated thus:

- i. Evidence presented confirmed that the claimant voided Kshs. 5, 620.00 worth of genuine sales and finished the transaction with KSL sweet costing Kshs.2.00 and the company lost Kshs. 5, 618.00.
- ii. The claimant was unable to support his claim of having voided the merchandise due to a technical problem with the point of sale system at his till. The respondent's ICT department had found that explanation unjustifiable.
- iii. The voided merchandise could neither be traced in the respondent's sales and inventory records nor at the point of sale or at the shelves.

The claimant as at termination earned Kshs. 54, 092.00 per month. His demand letter was dated 18.09.2015. The claimant's case is that the termination was procedurally and substantially unfair as the claimant was innocent of all the allegations made against him. He prayed for judgment against the respondent for:

1. Payment of 1 1/2 months' salary in lieu of notice.
2. Compensation for unfair termination or dismissal up to 12 months' salary at the time of leaving employment Kshs. 54, 092.00 x 12 = Kshs. 649, 104.00.

3. Service pay for years worked.

4. Costs of the suit and interest thereupon.

The respondent filed the defence on 24.11.2015 through Kadima & Company Advocates. The respondent admitted that it employed the claimant and admitted that the contract of employment was terminated in the circumstances as pleaded for the claimant. The respondent denied that the termination was procedurally and substantially unfair as pleaded for the claimant. The respondent stated that the claimant's final dues were calculated and the claimant had refused to collect the final dues Kshs. 45, 698.00. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case. The respondent opted to rely on the pleadings and the documents. The parties filed their respective submissions. The Court has considered all the material on record. The Court makes findings as follows.

There is no dispute that parties were in a contract of service and the contract was terminated as pleaded for the claimant. The main dispute is whether the termination of the contract was procedurally and substantially unfair as pleaded for the claimant.

The Court has considered the evidence and the pleadings. The claimant has shown that he was notified the allegations, he relied on his written statement, he attended the disciplinary hearing, he was heard, and the letter of termination issued. The Court finds that by that claimant's pleading and evidence, the procedure leading to the termination was not unfair as it included the notice and hearing as envisaged in section 41 of the Employment Act, 2007.

The claimant testified that he admitted that he voided transactions. He testified in cross-examination thus, **"I was issued reason for dismissal – gross misconduct. I was invited to disciplinary hearing. I was given an opportunity to respond. The disciplinary proceedings are minuted. I admitted I used to void transactions. I voided on 31 transactions. I would say how items became untraceable. The minutes are written by the respondent. It's not my signature. I have exhibited the minutes. I was not involved in returning items to the shelves."** In the re-examination the claimant stated, **"There was a company - Hiporah – which had been contracted by the respondent to return voided items. Supervisor would use his password. I could not appropriate voided items, while at the counter."** The Court has also examined the minutes of the disciplinary hearing. The minutes show as follows:

- a. The claimant admitted that he voided transactions and the allegations put to him about fraudulently voiding 31 transactions were true.
- b. When asked about the transaction in issue on 21.07.2015 being the case of the TV Toshiba, the claimant replied that he could not clearly remember but it was that the customer used loyalty points to void the transaction and further the claimant stated he could not remember the transaction as shown from the system.
- c. Voided goods were not scanned when returned to shelves and he did not remember the transactions.

The shop steward present at the meeting gave his view thus, **"I think his explanation is clear. My concern is that the cashier should be concerned about returning the goods to the shelves. I think it is the high time you define the roles and the responsibility of a cashier as it is challenging to void transactions and at the same time return the goods to the shelves."**

The Court has considered the evidence and the submissions. As per the respondent's submissions and the claimant's own evidence, the claimant admitted to voiding the 31 items and which were missing at the shelves. The claimant could not offer an explanation even after he was shown the record of transactions per the system and he told the disciplinary committee that he could not remember the transactions, at all. The Court returns that the respondent has established that the reason for termination to have existed and was genuine as at termination per section 43 of the Employment Act, 2007.

While the reason for termination existed because the claimant in any event admitted the allegations, the Court has considered the respondent's defective operational system as expressed in the shop steward's view at the disciplinary hearing. The respondent offered no explanation to address that defect and each party will bear own costs of the suit. No service pay is due because the claimant was a member of the NSSF. The Court considers that in absence of any other material on record, the respondent was entitled to compute the claimant's final dues at **Kshs. 45, 698.00** as exhibited – and the claimant was entitled accordingly, for his terminal dues. In conclusion the suit is hereby dismissed with orders each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18<sup>TH</sup>**

**FEBRUARY, 2022**

**BYRAM ONGAYA**

**JUDGE**