



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 177 OF 2018

JASON AMBUTSI MBOKA.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a general workers commencing 1st June, 2014 on a basic salary of Kshs. 15,375 per month throughout his employment save for the month of December, 2014 when the Respondent paid him Kshs 8,288 instead of the usual Kshs 15, 375.

2. The Claimant states that he worked for the Respondent until 3rd of March 2018 when he was summarily dismissed from employment. He was then arrested and locked at kaptembwa police station for 3 days on the allegation of stealing by servant. He states that he was never arraigned in Court.

3. After his termination, the Claimant was served with a show cause letter dated 6th March, 2018 on the allegation of stealing company property, which were particularized as stealing 4 pieces of one Kilogram Kwanga Soap.

4. The Claimant then responded to the show cause letter on the 7th March, 2018 denying the allegation in the letter and instead stated that he only had 700g Toyo soap which was routinely given to him together with all other employees at the end of each month.

5. A hearing Notice dated 9th March, 2018 was then served upon the Claimant for disciplinary hearing scheduled on 12th March, 2018 at 10.00 am. The Respondent delivered its decision on the same day, formally dismissing the Claimant from employment.

6. The Claimant then appealed the Respondent's decision vide his letters of 19th march, 2018 and 26th April, 2018. Subsequently, the Respondent scheduled an appeal hearing on 6th April, 2018 vide its letter of 26th March, 2018. After hearing the Claimant on the appeal the Respondent upheld its decision to dismiss him. Subsequently, the Claimant was served with a letter titled 'settlement of final dues 2018' which indicated the Claimant's final dues as Kshs. 1,427. The Claimant declined to sign the said discharge voucher and instead preferred this suit before this Court and sought the following reliefs:-

- a) One month salary in lieu of notice of Kshs 17,681.25.**
- b) Compensation for the unfair termination of Kshs 212, 175.**
- c) Underpayments of Kshs 2,149.75.**
- d) House allowance throughout the period worked of Kshs. 111,471.90.**
- e) Costs of this suit.**

7. The Respondent entered appearance on the 11th October, 2018 and filed a response to claim on the 24th October, 2018. The Respondent avers that the Claimant was employed on 1st June, 2014 earning a daily wage of Kshs 484 and upon his termination on 12th March, 2018 he was earning a daily wage of Kshs. 571.

8. The reason for termination, according to the Respondent, was that on the 4th march, 2018, the Claimant upon being frisked at the gate, was found in possession of 4, one kilogram Kwanga Bar soap without any authorization.

9. On 6th march, 2018 the Claimant was issued with a show cause letter and summoned to disciplinary hearing which he attended accompanied by Patrick Oduor as his employee of choice. The Claimant was then found capable and dismissed. He appealed the decision of the Respondent however the dismissal was upheld.

10. The Respondent therefore maintain that the Claimant was terminated for gross misconduct and subjected to the internal disciplinary mechanisms, therefore that the termination was proper in the circumstances and was done in accordance with section 44 (4)(g) of the Employment Act.

Hearing.

11. The Claimant testified as CW-1 and adopted his witness statement dated 22.5.2018 which reiterated the claim herein. Upon cross-examination the witness testified that he worked for the Respondent as a general worker in making soap. He testified that on the 4.3.2018 while he was exiting the Respondent's premises having worked overnight, he was pounced by Omariba, a KK Security personnel who was guarding the Respondent's premises and accused of being in possession of soap without authorization. He stated that he had one piece of soap which was one given to all employees monthly. He contends that he had differences with Omariba and he had earlier threatened to sack him.

12. He testified further that during hearing the alleged eye witness, Omariba was not called to testify in the disciplinary hearing. That he appealed the decision of the Respondent but never received the outcome to date.

13. The Respondent also called one witness, **Evans Ondimu**, the Human Resource manager as RW-1, who adopted his witness statement dated 9.4.2021 and in addition stated that the Claimant was dismissed for stealing. He also testified that the Claimant was never underpaid at any one point as his pay was in accordance with the regulations of wages subsisting at the time. He also added that the Claimant's pay was inclusive of house allowance and that upon termination the Claimant refused to collect his terminal dues together with certificate of service.

14. Upon cross examination, RW-1 testified that he doesn't have any documents to show that he works for the Respondent. He further affirmed that he never caught the Claimant stealing or in possession of any stolen goods and he was merely informed of the alleged theft.

15. Upon further cross examination, he maintained that the Claimant was found in possession of 4 bar soaps which was the subject of disciplinary hearing and the appeal. He also informed the Court that the matter was reported to the police however that no criminal charges were preferred against the Claimant. Additionally, he admitted that the Respondent's employees are given one bar soap each month. Finally, he avers that the Claimant's pay slip does not indicate payment of House allowance.

Claimant's Submissions.

16. The gist of the Claimant's submissions is that the Respondent failed to observe due procedure in arriving at his termination. He argued that the termination was unfair both in substance and procedure and relied on the case of **National Bank of Kenya V Samuel Nguru Mutonya [2019] eKLR** and the case of **Florence Wambui Gitau V Eclipse International [2019] eKLR** and urge this Court to allow the claim as prayed.

Respondent's Submissions.

17. The Respondent submitted that the Claimant was terminated for justifiable reason being that he was found in possession of 4 bars soaps without authorization. It was argued that section 44(4)(g) of the Employment Act empowers an employer to summarily terminate an employee for gross misconduct. It then relied in the case of **Walter Ogal Anuro V Teachers Service Commission [2013] eKLR** where the Court held that; -

"...for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness."

18. It was further submitted that the Claimant was subjected to disciplinary hearing which was properly done and even appealed the decision of the Respondent, though the appeal failed. This According to the Respondent met the procedural fairness test.

19. In conclusion, the Respondent submitted that it terminated the Claimant's services on justifiable reason, using the set out procedure under the law therefore the termination was fair and the Claimant is not entitled to the reliefs sought.

20. I have examined the evidence and submissions of the parties herein, the Claimant had indicated that he was dismissed on 3/3/2018. He showed no communication indicating this dismissal.

21. However, he exhibited a show cause letter dated 6/3/2018 asking him for show cause why disciplinary action should not be taken against him for stealing company property on an incident that occurred on 4th March, 2018.

22. Vide a letter dated 7/3/2018, the Claimant responded denying stealing the Respondent's property.

23. On 7/3/2018 he was invited for a disciplinary hearing to take place on 12/3/2018 at 10.00am.

24. The Claimant admitted attending the disciplinary hearing on the said date following which he was dismissed on even date.
25. The Claimant denied stealing soap from the Claimant. During the disciplinary hearing, the guard who purportedly caught the Claimant with the stolen soap was called as a witness and he reiterated his finding that he caught the Claimant with soap 4 bars and another piece.
26. The minutes of the disciplinary hearing were also produced by the Respondents as exhibit and show what transpired therein.
27. In any case Section 43 of Employment Act 2007 states as follows;

“43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of [section 45](#).

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

28. As per this provision, reasons for termination must be valid which existed at the time of dismissal. In the case of the Claimant, theft by servant was a reason which was valid and in existence at time of dismissal.
29. The Claimant was also subjected to a fair disciplinary process as indicated above.
30. It is therefore my finding that the dismissal of the Claimant was fair and just in the circumstances and therefore the claim by the Claimant is not merited and is therefore dismissed accordingly.
31. Each party will bear its own costs.

Dated and delivered virtually this 21ST day of **APRIL, 2022.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Fred