



**Mudzomba v Bafagih Bakeries Limited (Cause 868 of 2017)
[2022] KEELRC 1594 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1594 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 868 OF 2017**

**B ONGAYA, J
MAY 27, 2022**

BETWEEN

MOHAMMED MUNGA MUDZOMBA CLAIMANT

AND

BAFAGIH BAKERIES LIMITED RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim on 17.11.2017 through Oyugi Kitoo & Company Advocates. The claimant alleges as follows. The respondent employed him as a slicer and packager on November 19, 2013 at a daily wage of Kshs 300.00 which was later increased to Kshs 350.00. As at termination his daily wage was Kshs 450.00. In June 2016 the claimant and other employees decided to join the Bakery, Confectionary, Food Manufacturing & Allied Workers Union. On October 15, 2016 one of the supervisors Masoud a.k.a Vincent Mutua called the claimant at night and told him not to report to work the following morning and no reasons were given. On October 16, 2016 the claimant reported to work at 6.00am and was assigned the day's duties by another supervisor one Abdulkadir. Later that day he was confronted by Masoud for reporting to work contrary to Masoud's instructions not to do so by the previous night's telephone call. The claimant stated to Masoud that he would not go away unless instructed so by the Manager Randiki Oginga or Director Mohamed Mohsen Ali who hired him. Mohsen was called to the premises, he arrived and summoned the claimant who was busy at work as assigned. Mohsen confirmed that he was the one who had instructed Masoud to direct him not to work on that material day upon the Manager's allegations that the claimant was under investigations for inciting and leading his colleagues into joining the said trade union. Mohsen directed the claimant to step aside to pave way for investigations to be concluded before he could resume work.
2. The claimant's further pleaded as follows. Mohsen assured the claimant that he would be paid salary for the number of days worked in that month (up to October 16, 2016) and the claimant decided to step aside to pave way for investigations as was requested. Thereafter the claimant severally tried calling Mohsen on the progress but his telephone calls were never picked. On October 19, 2016 the claimant



reported to the trade union that he had been unfairly targeted and discriminated for leading others in joining the union and as a result unfairly terminated. The respondent was summoned but completely denied the allegations. The claimant reported a dispute to the Voi labour offices for respondent's violation of constitutional rights and respondent was summoned and the Manager Oginga Randiki attended on July 11, 2017 but negotiations collapsed.

3. The claimant's further case was that as at suspension that amounted to termination he was not paid the days worked in October 2016, he was not given a termination notice, he had not been paid outstanding leave for the period November 19, 2013 to October 17, 2016 and no certificate of service was delivered to him. His case is that the termination was unfair, un-procedural, and unlawful under sections 41, 43, and 44 of the Employment Act, 2007. He further stated that the termination was in violation of his right to fair administrative action and fair labour practices per articles 47(1) and 41 of the Constitution respectively. Further, it was in breach of section 45 of Employment Act, 2007 and ILO Convention 158 on termination of employment, 1982 as there was no genuine reason for the claimant's dismissal.
4. The claimant claimed one-month salary *in lieu* of notice; sixteen days worked in October 2016; leave pay for period served November 19, 2013 to October 17, 2016; house allowance for all period served, public holidays for the period; and compensation particularised as follows:
 - a. Notice pay 450×26 Kshs 11,700.00.
 - b. Leave pay for 3 years $11,700 \times 3$ Kshs 35,100.00.
 - c. House allowance $11,700 \times 15\% = 1,755 \times 36$ months Kshs 63,180.00.
 - d. 28 public holidays $\times 450 \times 2 =$ Kshs 25,200.00.
 - e. Compensation for unfair termination $11,700 \times 12 =$ Kshs 140,400.00.
 - f. Total claim Kshs 275,580.00.The claimant prayed for judgment against the respondent for:
 1. The respondent to pay the claimant the Kshs 275,580.00.
 2. Costs of the claim and interest.
 3. A declaration that the dismissal of the claimant from work was unfair and unjust.
 4. Certificate of service.
 5. Any other further relief as the honourable court may deem just.
5. The respondent filed on April 10, 2018 the response to the memorandum of claim through Wameyo Onyango & Associates Advocates. The respondent admitted it employed the claimant as pleaded for the claimant. The respondent further pleaded as follows. The claimant had listed his workmates and forged their signatures in a form the trade union relied on as having recruited the respondent's said employees. The claimant was given a chance to defend himself at the meeting held at the Manager's office on October 15, 2016. The claimant failed to defend himself stating that he had acted with full authority of the workmates. By letter dated October 13, 2016 the claimant was given 21 days to gather more information and to make further presentation. However, the claimant declined to accept the letter of October 13, 2016 stating that the trade union secretary-general had advised him not to receive or accept any correspondence from the respondent. The claimant thereafter left the respondent's office and premises knowing that the disciplinary proceedings had not been concluded and thereby deserted lawful duty. The respondent pleaded that it was a stranger to the terminal dues claimed. The respondent counterclaimed that the claimant having deserted duty, the respondent was entitled to



the contractual one-month payment in lieu of termination notice that the claimant ought to have served the respondent. The respondent prayed that the claimant's suit be dismissed with costs and the claimant to pay the respondent Kshs 10, 400.00.

6. On July 8, 2020 the respondent filed a notice of change of its advocates to M, washushe & Company Advocates. On November 11, 2021 the Advocates file an application to cease acting and which was allowed on December 14, 2021. Despite service of a hearing notice upon the respondent, the respondent and its witness failed to attend the hearing. At the hearing on May 5, 2022 it was ordered thus:
 1. Documents filed for parties admitted in evidence as filed and upon oral application by counsel for the claimant.
 2. Hearing to proceed *ex-parte*.
7. The claimant testified by simply adopting his witness statement on record. Final submissions were filed for the claimant. The court has considered the submissions, the claimant's evidence, the documents filed for parties, and the pleadings and makes findings as follows.
8. First, there is no dispute that the parties were in a contract of service whose terms of service are as was pleaded for the claimant.
9. Second, parties are in dispute on the circumstances of the separation. The respondent's account is that an issue arose that the claimant falsified the list and signatures of its employees purportedly recruited by the trade union. The claimant failed to exculpate himself at the meeting held on October 15, 2016 as pleaded at paragraph 6 of the response to the memorandum of claim. At paragraph 8 thereof the respondent pleads that it was then considerate by letter dated October 13, 2016 to give the claimant a further 21 days to defend himself. The respondent then exhibits the purported letter dated November 13, 2016 suspending the claimant. Paragraph 1 of the letter refers to reported complaints alleging that the claimant had forged and uttered documents containing co-workers' signatures facts of which the claimant was aware about. The letter at paragraph 2 thereof proceeds to state, "In furtherance to this, the management did invite you and the complainants for a meeting on the October 15, 2016 to deliberate on the issue. During the meeting held at the Manager's office, you failed to provide evidence to support your claim that you signed the documents with authority of complainants." The letter proceeds to purport to give the claimant 21 days to defend himself. The court finds that it was incoherent and indeed absurd for the respondent to have pretended to be prophetic in issuing and delivering the letter of suspension on November 13, 2016 and which letter made an account of events of a meeting allegedly held on October 15, 2016. The court finds that the respondent's account on the circumstances of separation cannot be trusted at all. The respondent has exhibited the hand-written notes or minutes of the meeting said to have been held on October 15, 2016 and all its staff appear to have attended. The record shows that each of the employee who had joined the union including the claimant addressed and each indicated had decided to join the union for its benefits. The issue of the forged signatures in the listed names of the employees recruited by the union (and exhibited for the respondent) appear not to have been an agenda or discussed at all at the meeting of October 15, 2016. The court finds that in absence of any other material the respondent's account of the circumstances of separation cannot be reliable at all and in absence of a witness, the account is found not justified.
10. The court finds that the claimant's pleaded case and account as testified is credible. It is that after the staff meeting of October 15, 2016, the claimant was telephoned at night as pleaded and testified. Subsequently on October 16, 2016 he was required to go away pending some alleged but unfounded allegations that he had incited and lead his co-workers to join the trade union. The court finds that the respondent terminated the claimant's employment on October 16, 2016 when the Director Mohamed



Mohsen Ali asked him to go away pending investigations but he was later not recalled and he was disconnected by the Director despite the claimant's efforts to get in touch by telephone.

11. Third, the court finds that the termination was unfair as the constitutional, statutory and convention provisions as pleaded for the claimant were violated. In particular, the court finds that the claimant was not given a notice and a hearing of alleged or any misconduct or poor performance as per section 41 of the Employment Act. Further, the respondent has not shown a fair reason for termination relating to the claimant's conduct, compatibility, capacity or respondent's operational requirements that justified the termination as envisaged in section 45 of the Act. As submitted for the claimant, article 41(2) (c) of the Constitution entitled the claimant as a worker to form, join, or participate in the activities and programmes of a trade union. Section 46 of the Employment Act, 2007 provides that it does not constitute fair reason for dismissal or for the imposition of a disciplinary penalty on account of an employee's membership or proposed membership of a trade union; the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours; an employee's seeking of office as, or acting or having acted in the capacity of a trade union or a workers representative; or an employee's refusal or proposed refusal to join or withdrawal from a trade union.
12. In the instant case the court finds that the respondent terminated the claimant's employment upon an unfair and unlawful reason, namely becoming a member of a trade union. That amounted to a serious aggravating factor manifested in the violation of the claimant's statutory and constitutional rights as a worker as already highlighted. The claimant otherwise had a clean record of service and had served the respondent diligently. He desired to continue in respondent's service. The respondent offered no mitigating factor as envisaged in section 49 of the Employment Act, 2007. The claimant is awarded 12 months' salaries in compensation as claimed and prayed for making Kshs 140, 400.00 plus one-month salary *in lieu* of termination notice Kshs 11, 700.00 per sections 35 and 41 of the Act as submitted.
13. Third, the court has considered the claimant's prayers on the headings of leave allowance, house allowance, and public holidays. The evidence was that parties agreed on a daily wage and the claimant appears not to have pleaded and established the contractual basis of those claims. If he worked on public holidays, then he must have been paid and it is not justified, in the court's opinion, for him to claim double for public holidays as was alleged. In any event, termination was on October 16, 2016, the suit was filed on November 17, 2017, and the court finds that the injuries were of continuing nature running throughout the 3 years of service and ceasing on October 16, 2016. The court finds that the claims and prayers on the three headings were time barred under section 90 of the Employment Act, 2007 because the prescribed 12 months of limitation had lapsed on or about October 16, 2017. The three prayers are therefore declined.
14. Fourth, the court returns that the counterclaim was based on alleged desertion but which has been found not to have been the case. The counterclaim will be dismissed with costs.
15. As the claimant has substantially succeeded, the respondent will pay costs of the suit.
16. In conclusion, judgment is hereby entered for the claimant against the respondent for:
 1. The declaration the termination of the contract of service was unfair, unlawful and unjust.
 2. The respondent to pay the claimant Kshs 152, 100.00 by July 1, 2022 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
 3. The respondent to deliver the certificate of service per section 51 of the Employment Act, 2007 by July 1, 2022.



4. The respondent to pay the claimant's costs of the suit and the counter-claim.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS
FRIDAY 27TH MAY, 2022.**

BYRAM ONGAYA

JUDGE

