



**Were v Eldo Matt Supermarket Ltd (Cause 11 of 2017)
[2022] KEELRC 64 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 64 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 11 OF 2017
NJ ABUODHA, J
MAY 9, 2022**

BETWEEN

ZEDEKIAH AMAKOBE WERE CLAIMANT

AND

ELDO MATT SUPERMARKET LTD DEFENDANT

JUDGMENT

1. The claimant averred that he was verbally employed by the respondent as a shelf/shop attendant from 1st March, 2013. At the time of termination, his monthly salary was Ksh.13,500/= which was paid in cash.
2. According to the claimant, the respondent on 4th August, 2014 terminated his service on allegation that he was planning a strike. The particulars of this allegation were never availed to him.
3. The claimant further averred that upon termination the respondent refused and or ignored to pay him his terminal dues despite several requests.
4. The claimant further alleged that the termination was unfair because there were no valid reasons and that the respondent never gave him any termination notice. The claimant further complained that during the period he worked for the responded he never went on leave and upon termination the respondent never paid him service pay and further that he worked overtime without pay.
5. In response to the statement of claim the respondent denied it unlawfully and unfairly terminated the claimant's service and averred that the termination was lawful.
6. At the oral hearing the claimant adopted his statement dated 2nd March, 2018 as his evidence in chief. He stated that he was orally employed on 1st March, 2013 and worked until 4th August, 2014 when he was dismissed. He was accused of planning a strike by the Manager Mr Chitu. His boss called him and



- showed him a small letter and he denied he was the one who wrote the letter. The letter was calling for a strike. Mr Shah then called him to the office for a meeting after that dismissed him without any notice.
7. Regarding working hours, he stated that he used to report at 7.00am and work until 8.00pm. he used to work 7 days a week and get one off day per month. He never went on leave for the period he worked and that he used to work during public holidays. Concerning terminal dues, he said he was paid but the signature on the discharge letter and the pay slip were not his.
 8. In cross-examination he stated that his contract was verbal and that his starting salary never changed. The salary was paid in cash and he signed for it.
 9. Regarding the strike he stated that he fell sick on 1st August, 2014 and on 4th he reported to work and was called by his boss who accused him of planning a strike. Regarding his salary he stated that he was paid until July, 2014. The claimant denied signing the discharge voucher.
 10. The respondent's witness Mr Jaideep Shah stated that he was the director of the respondent. According to him, the claimant was employed in July, 2013. He recorded his witness statement on 10th October, 2017 which he adopted as his evidence in chief. He also adopted the documents filed with the claim.
 11. According to him the claimant absconded duties in July, 2014. He showed up on 4th August, 2014 and his services were terminated then. He was given a hearing but would not explain where he was. He could only account for three days which he said he was sick. According to him, the claimant was paid all his terminal dues upon termination of his service. He denied the claimant's signature on the discharge voucher was forged. It was the same as the signature on his letter of appointment. The claimant never applied for leave of absence and that leave was requested for in writing.
 12. In cross- examination he stated that the claimant disappeared from work and that they never reported his absence to the Ministry of Labour.
 13. Mr Shah further stated that he did not have the minutes in court but the claimant was issued with a show cause letter. It was further his evidence that the claimant was paid Ksh 13,500/- in full and final settlement. The salary for July was also paid.
 14. Under section 47(5) of the [Employment Act](#), the burden of proof that an unfair termination or wrongful dismissal has occurred is on the employee while the burden of justifying the ground for dismissal is on the employer.
 15. The claimant alleged that the respondents dismissed him on account of the fact that he was accused of involvement in planning a strike at his place of work. According to the claimant, he fell sick on 1st August, 2014 and was unable to report to work until 4th and when he reported he was summoned to the office by Mr Shah and accused of planning a strike. According to the respondent however, the claimant absconded duties and could not explain his whereabouts when he returned to work. The court noted that although the claimant alleged, he was unwell, he never produced any sick-sheet or medical notes from a doctor showing the nature of illness he suffered from which prevented him from going to work. The accusations by the respondent that the claimant absented himself from work without authority or lawful excuse therefore became more credible than his allegation that he was dismissed on allegations of planning a strike. Absence from work without a lawful cause is a valid ground for summary dismissal. The claimant in this particular case failed to show that he was unwell and that it prevented him from going to work.
 16. The claimant though denied it, was appointed to employment in writing. The respondent however in terminating the claimant did not issue him with a termination letter. Further the respondent though



- claimed the claimant was heard before termination never produced any minutes or memorandum of proceedings at the conclusion of which the claimant was dismissed.
17. A dismissal or termination letter is a very important document in separation from employment because in the event of a dispute it becomes the document of reference to establish whether the reasons for termination or dismissal were the same as the allegations or accusations the employee was facing. In the absence of a show cause letter or letter of termination the employer is placed in a difficult position in justifying the reasons for dismissal and or termination.
 18. In this particular case, the claimant's own admission and conduct created a justification for summary dismissal however the respondent still ought to have subjected the claimant to disciplinary hearing. To this extent the court will find and hold that the termination was unfair for lack of procedural fairness. Taking into account the claimant's contribution to the situation, an award for four months' salary as compensation for unfair termination would be reasonable.
 19. The claimant made a claim for leave. The respondent never seemed to have denied that the claimant did not go on leave. Besides they never produced the claimant's employment records to show he went on leave. This prayer will therefore be allowed as claimed. That is to say the claimant is hereby awarded Ksh.13,660 on account of annual leave.
 20. The claimant put forward a claim for overtime however the court noted that from one of the claimant's payslip attached as part of the respondent's documents the claimant was paid overtime whenever worked. The claimant though pleaded a claim for overtime, did not however in his witness statement or oral evidence in court state the nature of work he performed that required him to work overtime and when he worked overtime. He simply presented an omnibus claim for overtime suggesting he worked overtime throughout and was never paid even where the respondent showed overtime was paid. This claim is therefore unsupported and will be rejected. The claimant's pay slip further showed he was paid for Sundays, hence the claim for rest days is not justified.
 21. The claimant denied that he signed the discharge voucher dated 10th August, 2014, he further denied signing his letter of appointment and pay slip produced by the respondent in its bundle of documents. The court has cautioned itself that it is not a hand writing expert but the similarity between the claimant's signature on the verifying affidavit, his witness statements, his letter of appointment and the discharge voucher are so striking that any reasonable person would easily conclude they were signed by the same person. The court therefore does not believe the claimant when he denies signing even his own letter of appointment which formed the basis of his relationship with the respondent.
 22. In conclusion the court awards the claimant as follows:
Ksh
 - a. Four months' salary for unfair termination of service 54,640
 - b. One months' salary in lieu of leave 13,660 68,300
 - c. Less paid 13,150

55,150
 23. The claimant shall further have the costs of the suit
 24. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY, 2022

ABUODHA NELSON JORUM



JUDGE ELRC

