



**Mutai v Doinyo Lessos Creameries Limited (Cause 178 of 2017)  
[2022] KEELRC 1252 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1252 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 178 OF 2017  
NJ ABUODHA, J  
JULY 8, 2022**

**BETWEEN**

**DORIS CHEPKEMOI MUTAI ..... CLAIMANT**

**AND**

**DOINYO LESSOS CREAMERIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant averred that she was employed on 3<sup>rd</sup> September, 2013 as a general labourer and worked until 14<sup>th</sup> March, 2017 when the respondent unlawfully terminated her service and refused to pay her dues. According to the claimant, the termination was contrary to the Employment Act in that her union was not informed of the intention to terminate her service, she was not given an opportunity to be heard, no leave pay was given and no service pay was made.
2. The claimant therefore claimed pay in lieu of notice, unpaid public holiday, overtime dues, severance pay and compensation for unfair termination.
3. The respondent on its part pleaded that it did not terminate the claimant's service as alleged. According to the respondent, the claimant was dismissed on account of gross misconduct. That is to say the claimant failed to adhere to instructions by his supervisor, failed to report to duty as required. Further that the claimant stole while on duty and abandoned duty. According to the respondents, the claimant was issued with a notice to show cause but deliberately ignored to respond to the same.
4. At the trial the claimant stated that she recorded a statement on 10<sup>th</sup> July, 2017 which she adopted as her evidence in chief according to her. She was employed in September, 2013 and worked until May, 2017. On the material day, the supervisor came and told them that he found some stolen items in their hand bags. They were not aware of the incident. The supervisor told them to go home and report the next day. The next day they worked as usual and were later called to the office and were told that the respondent wanted to take pictures of them and that they were for making calendars. They thereafter



- resumed work and the next day they were issued with suspension letters and after two weeks they were issued with termination letters.
5. She consulted her lawyer who computed her claim and issued a demand letter.
  6. According to the claimant, she was unfairly terminated. There was no disciplinary hearing and that she had no previous warning. She denied stealing the milk.
  7. Concerning working hours, she stated that she used to report to work at 8.00 am and leaving depended on when work ended. It was at 8.00pm or 9.00pm she further stated that she used to work during public holidays.
  8. In cross-examination she stated that her work was packing fresh milk and yoghurt. The stolen products were found in the changing room she further stated that she was issued with a show cause letter and that she wrote admitting the mistake.
  9. It was her evidence that they were given the option of admitting the offence or getting terminated.
  10. Concerning working hours she stated that they had three off days in a week and that they never got off days after working overtime and that she went on leave during the period she worked.
  11. In re-examination she stated that the changing room was for all of them and that they were about forty people using the changing room. According to her, she wrote the letter to save her job.
  12. The respondent's witness Emily Lukaka stated that she worked for the respondents. Human Resource Manager and that she had worked for twenty years.
  13. She relied on her witness statement recorded on 9<sup>th</sup> November, 2017 as her evidence in chief.
  14. According to her, she issued the claimant and her colleagues with show cause letters and the claimant responded and apologised. The claimant was thereafter suspended pending investigations. After fourteen days the claimants were issued with termination letters.
  15. Concerning work hours, it was her evidence that when employees work overtime they are given off-days. It was further her evidence that the claimant was paid her terminal dues upon dismissal.
  16. In cross-examination she stated that she visited the changing room on the material day and found some yoghurt, mursik and maziwa lala. They were in the claimant's handbag.
  17. The supervisor took photos of the scene but they were not filed in court.
  18. It was further her evidence that the claimant was invited for disciplinary hearing. Those present were the production manager, the supervisor and herself. She however stated that there was no letter of invitation for disciplinary hearing.
  19. Concerning payment of terminal dues, she stated the claimant was not paid her terminal dues because she was summarily dismissed and that the apology letter did not state the offence or mistake but the apology was over stealing and that she never asked the claimant to apologise. She apologised on her own.
  20. It is not in dispute that the claimant herein was summarily dismissed and the reasons for the dismissal. It was not contested that some milk and milk products were found in the changing room where the claimant and her colleagues kept their handbags. Although the claimant denied, according to the respondent the milk and milk products were found in the claimant and her colleagues' handbags. The claimant and her colleagues implicated were subsequently issued with suspension letters and thereafter summarily dismissed.



21. According to the claimant, she was issued with a show cause letter and wrote back admitting the mistake. The letter was produced by the respondent as one of the exhibits in its bundle of document filed in support of their defence. The claimant however stated that she wrote the letter in issue to save her job.
22. The burden of proof that unfair termination has occurred is on the employee while the burden of proving the reasons for the termination is on the employer. The claimant herein admitted the accusation against her and tendered an apology. She therefore could not again claim that she was unfairly terminated. She stated that she was issued with a show cause letter which she responded to admitting the accusation against her. The claimant never tendered any reason and or under what circumstances the milk and other milk products found their way to the changing room and into her handbag. It could only be assumed that she intended to unlawfully appropriate the same. Theft is a valid ground for summary dismissal hence the respondent was justified in summarily dismissal of the claimant.
23. The claimant put forward a claim for leave however in her evidence in cross-examination she stated that they used to get off-days and that they used to go on leave. The claim for unpaid leave cannot therefore be sustained. The claimant further made a claim for overtime however she never led evidence to show the nature of the work she performed that required her to work overtime on a daily basis. Whereas under the Employment Act it is the responsibility of an employer to keep employment records and produce them when called upon, an employee who claims overtime ought to lay a reasonable background for claiming such overtime and ask for production of records from the employer to show if indeed such overtime and for the period claimed was paid or not. The burden of proving the claim brought before the Court remains throughout on the person making the claim.
24. In the above regard the court is of the view that the claimant did not sufficiently discharge the burden cast upon her by law.
25. In conclusion the Court finds and hold that the claim has not been proved and the same is hereby dismissed with costs.
26. It is so ordered

**DATED AT ELDORET THIS 8TH JULY, 2022**

**DELIVERED AT ELDORET THIS 8TH JULY, 2022**

**ABUODHA JORUM NELSON**

**JUDGE**

