



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 2154 OF 2016**

**PETER MAINA MUNGAI.....CLAIMANT**

**VERSUS**

**BLACK PETALS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit against the Respondent her erstwhile employer seeking reliefs set out in the claim. He averred that he was employed in 2007 and through his exemplary performance obtained increments in salary from Kshs. 11,500/- to Kshs. 14,800/- as at the time of dismissal on 14<sup>th</sup> January 2016. The Claimant averred that the Respondent dismissed him without notice or any notification of the impending dismissal and that the dismissal was wrongful and unlawful without any colour of right. He sought outstanding wages – Kshs. 14,800/-, vacation pay (leave dues) – Kshs. 74,760/-, pay in lieu of notice and/or severance pay – Kshs. 14,800/-, 12 months salary compensation for the unlawful dismissal – Kshs. 177,600/- as well as costs of the suit.

2. The Respondent filed a defence in which it was averred that on 15<sup>th</sup> January 2016 while going for lunch, the finance manager of the Respondent one Mr. Jagdish saw a polythene paper next to the company premises and upon investigations launched by the company's security manager and accountant, the Police from Kawaida Police Station launched investigations and took the roll of polythene paper. It was averred that the Police arrested one Mr. Jackson Maruda who implicated a Mr. Joseph Waweru Wagucha alongside the Claimant as accomplices in the attempted theft. The Respondent averred that the Claimant was issued a show cause letter and was called by the HR Manager of the Respondent but he declined to receive the letter and refused to attend the meeting. The Respondent averred that it served the letter through the Claimant's union officials (shop stewards) Mr. Peter Emoja and Mr. Godfrey Juma who confirmed meeting the Claimant and informing him of the impending disciplinary hearing. The Respondent averred that the meeting was held as scheduled on 17<sup>th</sup> March 2016 and the shop stewards indicated that they had been unable to secure the attendance of the Claimant whereupon a decision to summarily dismiss the Claimant was made. The Respondent avers that the Claimant was informed of the right to appeal against the dismissal which opportunity he squandered. It was averred that the Claimant to date has failed and/or refused to clear with the respective departments upon which his terminal dues would be computed and paid.

3. The Claimant testified in the absence of the Respondent who had been duly served but who failed to attend the hearing. The Claimant in his testimony stated that he was previously employed by the Respondent and that he was dismissed without reason. He stated that he was not heard and that he was entitled to salary for the month of January, one month's salary in lieu of notice and the leave dues. He testified that as a result of the unlawful dismissal he was praying for maximum compensation as he was not heard. He informed the Court that he received Kshs. 14,800/- a month.

4. In his submissions filed the Claimant stated that his termination was unfair in terms of Section 45(2) of the Employment Act. He submitted that the Respondent had not controverted his evidence and cited the case of **Benjamin Ochieng Angaga v George Ombego [2020] eKLR** where it was held that:-

*In this case the respondent never filed defence and as such he never tendered any evidence to discharge the foregoing burden of proof. I therefore, find and hold that the respondent terminated the claimant's employment wrongfully and unfairly.*

The Claimant submitted that he never went on leave and that he had outstanding leave dues of Kshs. 74,760/- which the Respondent did not controvert by availing evidence. He sought compensation and cited the cases of **Pamela Butalanyi v University Council for the Kenya Polytechnic University College [2015] eKLR** and **John Mwanzia Mbithuka v Mukesh Malde (Managing Director) & Another [2014] eKLR** and urged the Court to award the maximum compensation.

5. From the evidence adduced by parties it is not contested that there was a theft that took place in the Respondent's business. It was asserted that the Claimant was not heard which was factual as the Respondent confirmed this in its defence. It was however shown in evidence attached to the memorandum of defence that the Claimant was invited for a disciplinary hearing and other than a blanket denial he offered in his reply to defence, there was nothing to show that he went to work after the theft on 15<sup>th</sup> January 2016. The letter from the Respondent dated 28<sup>th</sup> February 2016 is what contained the dismissal. This was not summary as the Respondent sent show cause letters through shop stewards of the Respondent who were the Claimant's representatives but the Claimant declined to attend the hearing despite the notification made. In the minutes of the disciplinary meeting held on 17<sup>th</sup> March 2016 the Claimant was clearly afforded an opportunity to attend but he declined. He could therefore not turn around and accuse the Respondent of not hearing him. Section 41 of the Employment Act is not a cover for failure to attend a disciplinary meeting procedurally called by the employer. The safeguard does not contemplate aiding an employee where the employee deliberately refuses to attend the disciplinary meeting. He was therefore granted an opportunity to attend and defend himself which he squandered. The suit as a result was misplaced and the Claimant having failed to prove the alleged unlawful dismissal on a balance of probabilities he cannot recover. The Respondent failed to attend the hearing of the suit scheduled for 9<sup>th</sup> December 2020 and consequently the suit stands dismissed albeit with no order as to costs.

It is so ordered.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of January 2021**

**Nzioki wa Makau**

**JUDGE**