



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 335 OF 2016

WELLINGTON MUSAMALI TORONI.....CLAIMANT

VERSUS

MAYFAIR HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed this suit on 16/11/2016 seeking maximum compensation for unlawful termination of employment and payment of terminal benefits including one months' salary in lieu of notice and payment in lieu of leave days not taken for twenty two (22) years.
2. The claimant testified as C.W.1 and stated that he worked for the respondent from 1994, as a casual employee and was paid Kshs.320 per week. That he worked continuously until he was summarily dismissed on 27/3/2015. That at the time of dismissal he earned Kshs.720 per day. That the reason for dismissal was that he received a letter stating that he had caused the company loss of Kshs. 37,200. That he was given a Show Cause letter and asked to explain which he did in writing and was summarily dismissed.
3. The alleged loss was deducted from the terminal benefits of the claimant and he was paid Kshs. 21,000 balance.
4. Under cross-examination the claimant stated that on 31/3/2014 he had received a warning letter in connection with processing work and on 31/1/2015 he got another warning letter for lateness.
5. The claimant denied on 29/12/2016 he got a letter for absenteeism. The claimant denied that he had failed to put ingredients of baking in the dough and 1,035 loafs were spoilt.
6. The claimant explained that he had forgotten to put the ingredients and it was his work to do so.
7. The claimant stated that he was paid in lieu of notice and in lieu of leave days; salary for March, 2015 and travelling allowance.
8. The claimant stated that Kshs. 37,260 was deducted from his terminal benefits and sacked for the same reason. The claimant said that the spoilt bread was recycled and the company did not therefore suffer much loss.
9. R.W.1 Abdul Majid Muhammed testified for the respondent and adopted a witness statement filed on 3/11/2017 as his evidence in Chief. The claimant also produced list of documents, marked '1' to '11' as his exhibits.
10. R.W.1 stated that the termination of employment of the claimant was lawful. That on 31/4/2014, the claimant was spotted greasing a driver's rounder, an equipment which does not require greasing and was outside his scope of work.
11. That on 28/11/2014, the claimant received a warning letter for negligently not adding yeast to one whole bowl of family bread 800grammes causing a loss to the respondent.
12. That on 30/1/2015, the claimant reported late to work and was warned in writing and on 2/12/2015 the claimant absented himself from work without authority and was issued another warning letter on 29/12/2015.
13. Thereafter the claimant acted negligently in failing to add premix in the dough he was handling and as a result the bread was sugarless and tasteless, and 1035 pieces of bread could not be sold making a loss of Kshs. 37,200.
14. The claimant got a show cause letter and he explained in writing.
15. The respondent decided to terminate the employment of claimant for repeated acts of negligence and misconduct.

16. That the claimant's employment was terminated by a letter dated 24/3/2016.
17. That the claimant's terminal dues were calculated and Kshs. 37,260 lost due to claimant's negligence deducted. The claimant was paid the balance of 37,260.
18. That the claimant signed a discharge voucher in full and final settlement.

Determination

19. The parties filed final submissions and the issues for determination are:-
 - (a) Whether the termination of employment of the claimant was for a valid reason following a fair procedure.
 - (b) Whether the deductions of Kshs. 37,260 from the claimant's terminal benefits was lawful.
 - (c) Whether the claimant is entitled to the reliefs sought.
20. The claimant in his testimony admitted that he had received warning letters for misconduct on 31/3/2014, and on 31/1/2015 for getting late. The claimant denied receipt of two other warning letters which R.W.1 stated had been given to the claimant for negligence in causing loss of bread and lateness.
21. The claimant admitted that he had failed to put correct ingredients in the baking dough causing 1,035 pieces of bread to be spoilt and could not be sold.
22. The claimant however explained that the spoilt bread was recycled and the company did not therefore incur losses. The respondent however found the claimant guilty of misconduct and terminated his employment by a letter dated 24/3/2016. The respondent paid the claimant in lieu of one month notice and in lieu of leave days not taken for the period 2014/2015 and 2015/2016. The claimant was paid a gross salary of Kshs. 71,207.94 less Kshs. 37,260 deemed by the respondent to be loss incurred from spoilt bread.
23. In the suit the Claimant seeks payment of one month salary in lieu of notice and in lieu of 17 years untaken leave. These two claims have not been proved on the face of the testimony by R.W.1. The two claims are dismissed for want of proof.
24. Furthermore, the Court is satisfied that the respondent has demonstrated on a balance of probability that it had a valid reason to terminate the employment of the claimant and it followed a fair procedure in doing so.
25. Indeed the claimant admitted the negligent omission that led to the termination of employment.
25. The claimant has therefore failed to discharge the onus placed on him under section 47(5) of the Employment Act, 2007 of showing on a balance of probabilities that the termination was wrongful.
26. The Claim for compensation for unlawful and unfair dismissal is therefore dismissed.
27. However, the respondent resorted to self-help by arbitrarily determining the loss the claimant had caused the respondent by the negligent conduct that led to his dismissal. The conduct of deducting Kshs. 37,260 from the terminal benefits of the claimant amounted to self-help and is unlawful and unfair on the face of the testimony by the claimant that the spoilt bread was recycled and no loss was occasioned the respondent.
28. The Court directs the Respondent to pay the claimant the balance of the terminal benefits due and owing to the claimant in the sum of Kshs. 37,260.
29. The rest of the suit is dismissed.
30. In the final analysis the Court makes the following final Orders:-
 - (i) The respondent to pay the balance of terminal benefits due and owing to the claimant in the sum of Kshs.37,260 with interest at Court rates from date of filing suit till payment in full.

- (ii) The respondent to pay half of the costs of the suit.

Dated and delivered at Nairobi this 4th day of March, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and Judgment be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Ouma for claimant

Mr. Yogo for Respondent

Chrispo: Court clerk.