



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1942 OF 2016**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**DOMINIC OWUOR OKUMU.....1<sup>ST</sup> CLAIMANT**

**CHARLES ODHIAMBO OCHIENG.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**FRUITY FRUITS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimants instituted this action in person by a joint statement of claim dated 19<sup>th</sup> September 2016 and filed on 21<sup>st</sup> September 2016. The Claimants allege that they were unfairly terminated by the Respondent on 22<sup>nd</sup> July 2016 allegedly for attempted theft of fruits, an allegation they denied. They pray for –

- (a) Compensation for unfair termination (12 months' salary) Kshs.444,000
- (b) Costs of this suit.
- (c) Interest at Court rates until payment in full.

2. The Respondent filed a response to the statement of claim on 13<sup>th</sup> October 2016. The Respondent denies the claim and states that the Claimants were caught attempting to steal crates of fruits while in duty and prays for dismissal of the suit.

**Claimants' Case**

3. The Claimants aver that they were employed by the Respondent on 25<sup>th</sup> March 2009 as general labourers. That their monthly salaries rose from Kshs.6,000 to 18,500 after their promotion to Shop Assistants. They further aver that on 22<sup>nd</sup> July 2016, the Respondent terminated them unfairly allegedly for attempted theft of crates of fruits but were paid for the 22 days worked in July, prorated leave for 8 months; service pay for the years served and one month salary in lieu of notice.

4. The Claimants pray for 12 months' salary each as compensation for unfair termination.

**Respondent's Case**

5. The Respondent avers that the Claimants were employed as Shop Assistants at the monthly salary set out in the statement of claim. That the Claimants were caught on CCTV camera attempting to steal fruits by parking them in unmarked crates and mixing them with crates destined for Mombasa. That the Supervisor identified the emptied and packaged crates. It further avers that the attempted theft notwithstanding, the Respondent agreed to pay the Claimants terminal dues including one month's salary in lieu of notice.

**Evidence**

6. Both CW1 and CW2 the Claimants, testified that they had worked for the Respondent for 6 years but had no documentary evidence to prove the date of employment and were dismissed on 22<sup>nd</sup> July 2016 on allegations of attempting to steal crates of fruits, which they denied. Both admitted that the shop had many CCTV cameras. Both indicated that because they were not reported to the police, they had committed

no wrong. Both admitted receiving terminal benefits and confirmed that they are suing for compensation for unlawful termination.

7. From the testimony of **CW2, Charles Odhiambo Ochieng**, it is discernible that the alleged confusion in weighing sweet melons in place of sweat corn was intended to camouflage their scheme to get fruits out of the Respondent's shop on the day of dismissal. It is also clear that the Claimants were not taken through any disciplinary hearing.

8. The Claimant did not file any submissions.

### **Respondent's Submissions**

9. The Respondent submits that the Claimants were dismissed for gross misconduct after they were caught attempting to steal a crate of fruits in the course of duty. That the incident was captured on CCTV.

10. It is further contended that CW1 Dominic Owuor admitted on cross examination that he was paid one month's salary in lieu of notice, leave days and service pay. Copies of vouchers were provided. CW1 admitted having received payment.

11. The Respondent relied on Section 43(2) of the Employment Act on the reason for termination –

***“The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”***

12. Counsel submitted that since the Respondent paid the Claimants all their duties they are not entitled to any compensation.

13. Reliance was made on Section 43(1) of the Employment Act on the duty of the employer to prove the reason(s) for termination. Section 45(2) was also relied on to urge the Court to find that the dismissal of the Claimants was substantively and procedurally fair.

14. Finally, the decision in **Davis Sokoto Nanyamal v Church World Service (CWS)/Resettlement Support Centre (RSC) Africa [2017] eKLR** was used to urge the Court to dismiss the claim as the Court did in this case where the Court found that the Respondent had a valid reason to warrant dismissal of the Claimant and which it had done after the Claimant had been heard..

15. In conclusion, the Respondent prays for dismissal of the Claimants' case with costs.

### **Analysis and Determination**

16. The issues for determination are: -

(a) Whether the Claimants termination was fair;

(b) Whether the Claimants are entitled to 12 months as compensation for unlawful dismissal.

17. On termination, Section 41(2) of the Employment Act provides that –

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.**

18. Section 45 provides that employer must have a valid and fair reason for termination and apply a fair procedure in the termination. (See **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**).

19. It is not in dispute that the Claimants were terminated on 22<sup>nd</sup> July 2016 on allegation of attempted stealing of fruits. Evidence on record shows that the Claimants were found with at least one crate of watermelon not destined for Mombasa yet they were weighing goods destined for Mombasa. CW2 confirmed on cross examination that the two were found with a crate of watermelon.

20. It is unclear who removed the crate of sweet melon from the store. CW2 testified that they were packing sweet melon and sweet corn destined for Mombasa yet the watermelon was not. Their main defence was that they were not reported to the police. The Respondent could have had any number of reason not to do so.

21. Although the Claimants denied that they attempted to steal the crate of watermelon, they were unable to explain how the crate found its way to the weighing point and why they did not engage the Supervisor when they discovered the mistake or confusion if that was the case. Although the Respondent led no evidence on how the Claimants intended to move the crate of watermelon out of the compound or whether another or other employees well involved, it is not in dispute that the Claimants created the suspicious circumstances that led to their summary dismissal on 22<sup>nd</sup> July 2016. If the mix up was genuine, the Claimants should have taken the initiative and explained the same to the Supervisor before the Supervisor or management perceived their conduct as attempted theft.

22. In the totality of the evidence on record, the Court finds that the Respondent had a valid and fair reason to dismiss the Claimants as provided by Section 43(2) of the Act.

23. On procedural fairness as ordained by Sections 41 and 45 of the Employment Act, the Claimants testified that they were not taken through any disciplinary hearing and the Respondent's witness confirmed on cross examination that the Respondent had no disciplinary procedures for employees. It therefore follows that the summary dismissal of the Claimants on 22<sup>nd</sup> July 2016 was procedurally flawed. The decision in **Davis Sokoto Nanyamal v Church World Service (CWS)/Resettlement Support Centre (RSC) Africa (supra)**.

24. It is the finding of this Court that the dismissal of the Claimants on 22<sup>nd</sup> July 2016 was unfair.

#### **Reliefs**

**(a) Both Claimants pray for the equivalent of 12 months' salary for the unfair termination. A total sum of Kshs.444,000.**

25. The remedy of compensation is provided by Section 49(1)(c) of the Employment Act. Although the remedy is discretionary, the Court is enjoined to exercise judicial discretion on the basis of the parameters or factors set forth in Section 49(4) of the Act. Taking into account the fact that the Claimants served the Respondent for about 4 years, 8 months and wished to continue but created the suspicious circumstances that led to their termination, the equivalent of two months' salary is fair.

26. In the final analysis judgment is entered for the Claimants as follows –

**(i) Dominic Owuor Okumu**

**(18,500 x 2) Kshs.37,000**

**(ii) Charles Odhiambo Ochieng**

**(18,500 x 2) Kshs.37,000**

**(iii) Interest at Court rates from the date of judgment till payment in full.**

**(iv) There will be no order as to costs.**

27. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF OCTOBER 2021**

**DR. JACOB GAKERI**

**JUDGE**

#### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings 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 1B** 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.

**DR. JACOB GAKERI**

**JUDGE**