



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

ELRC CAUSE NO. 73 OF 2015

PETER MARANDO NYABERI BICHUNGI.....CLAIMANT

VERSUS

VALLEY BAKERY LIMITED.....1ST RESPONDENT

VALLEY CONFECTIONARY.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents for unfair termination of his employment, payment of overtime and service pay.
2. The Claimant stated that he was employed first by the 1st Respondent in January, 2003 as a salesman earning a monthly salary of Kshs 6,828/- which was increased to Kshs. 12,982.90 by the time of his dismissal in March 2009.
3. He stated that he did his sales on Oserian route in Naivasha between 10pm in the evening to 7 pm the next day for 6 days with one rest day therefore clocking 21 hours each day.
4. The claimant stated also that he is a member of Flava Cooperative savings and Credit Society Limited which is a savings company established by the Respondents with its operations within the Respondents' premises.
5. He Stated that when he was dismissed in March 2009, he had a debt with the 1st Respondent and therefore before exiting the Respondent he requested the savings company to release some of his shares to the 1st Respondent to clear his debt and the balance to be forwarded to him which letter was received and duly responded to by Flava cooperative savings and credit society Limited on the 24th March, 2009 Also that he paid a further Kshs. 15,000/- to top up his savings and clear the debt.
6. On 13th September, 2011 the claimant was re-hired by the 2nd Respondent on a daily wage of Kshs 640/-. He stated that he worked well for the Respondent till 10th December, 2012 when he stepped aside to allow for investigation into an alleged misappropriation of funds which led to his dismissal.
7. The claimant stated since the Respondent did not call him back to work after stepping aside, he demanded for his dues on the 11th September, 2014 in vain.
8. He therefore prayed for judgment against the respondents for; -
 - a) His earnings be released from Flava cooperative savings and credit society limited run by the Respondents less deductions of Kshs. 118,228/- owed to the 1st Respondent.
 - b) Service pay of Kshs. 337,920/-.
 - c) Overtime worked of 13 hours from the year 2003 to the year 2009 amounting to Kshs. 792,280/- and between 2011 and 2012 of Kshs 407,680/-.
9. The Respondents entered Appearance on the 7th April, 2015 and filed a joint response and Counter-Claim on the 23rd April, 2015 and denied all the contends of the claim and stated that the claimant was employed by the 1st Respondent in May, 2004
10. They denied being part of Flava Co-operative Savings and Credit society limited, and averred that Flava Limited is a separate entity duly

registered which ought to be sued independent of themselves.

11. It was stated that the claimant dismissal from the 1st Respondent employ on 18th March, 2009 was lawful as it was precipitated by embezzlement of funds.

12. The respondents admitted that the claimant was rehired by the 2nd Respondent in September, 2011 who worked till 10th December, 2012 when he left employment at his volition.

13. The Respondents stated that the claim for overtime is time barred and also that the claimant was paid special allowance for the overtime worked as per his letter of appointment and in line with the CBA then in force being collective Bargaining Agreement of 2012-2014.

14. They also took issue with the claimant's claim arising from the employment between him and the 1st Respondent which came to an end in the year 2009 for being statute barred. Further that the claimant was paid by the 1st Respondent and acknowledged the terminal dues by signing a declaration to that effect.

15. The Respondents stated that the notice to produce is untenable as section 74(2) of the Employment Act mandates an employer to keep records of its employees for only 36 months. He averred that the claimant filed this suit in 2015 seeking for records between 2003- 2009 way out of time, outside the purview of the law.

16. The Respondents also stated that the Claimant is not entitled to service pay as the respondent remitted his NSSF deduction regularly as such the prayer for service pay is without basis.

17. On the counterclaim the Respondent averred that the claimant was employed by the 1st Respondent between May 2004 to March 2009. While at the 1st Respondent employ the Claimant misappropriated Kshs. 118,228/- belonging to the 1st Respondent which monies he had collected from various client during his sales.

18. It is stated that the Claimant never denied embezzling the said monies and accepted responsibility and even alleged to have instructed Flava savings limited to release his savings of Kshs 118, 228 when he had savings of Kshs 91,820 with the said Sacco with, leaving a balance of Kshs. 28,361/-.

19. That as much as the claimant allege to have instructed Flava Limited, the said Sacco has never paid the said sums of monies to the 1st Respondent and the 1st Respondent now counter-claims for the same.

20. The Respondents stated that when the claimant was employed by the 2nd Respondent in September, 2011 to December, 2012, he also misappropriated the sum of Kshs. 463,419.50/- belonging to the 2nd Respondent which monies he received from various customers while working for the Respondent as a salesperson, which monies the 2nd Respondent now counter-claims.

21. The Respondents in the counter-claim therefore prayed to be paid Kshs 118,228 and Kshs. 463,419/- together with costs of the counter-claim and interest thereof.

22. The claimant replied to the counterclaim on the 2nd July, 2015 and reiterated his claim and in particular admitted that Kshs 118,228 was unaccounted for and blamed the same on challenges he experienced while collecting the monies from the various client, and the fact that other clients issued fake currencies and the loss that occurred during distribution.

23. On the alleged embezzlement of Kshs 463,419/-, the claimant avers that the said monies were never embezzled by him rather that the said monies were owed to the 2nd Respondent by a client known as **Ken Some** who admitted indebtedness by a letter of 29th June, 2012.

24. During hearing the claimant, **Peter Marando**, testified that he was first employed as a casual in the year 2003 and then taken up as a salesman and in 2004 he was absorbed under permanent terms and paid Kshs. 7,000/- per month. He testified that he worked for the 1st Respondent from 2004 to 2009 when he was dismissed from employment due to alleged loss of funds. The letter of dismissal is dated 18th March, 2009. He stated that he belonged to Flava savings limited a Sacco that belongs to the respondents and they would make monthly deductions that reflected in the pay slips.

25. He testified that the cause of his dismissal was loss of Kshs 118,000/- which monies he told the court that where monies that were still with the Respondents client, nevertheless that he took an initiative and requested his Sacco to repay the said monies from his saving and forward to him the balance which Sacco agreed and wrote an affirmation letter to him. In addition, that he paid Kshs. 15,000/- and the debt was settled.

26. He testified further that he worked every day from 10pm to 7 pm covering 21 hours a day with one rest day.

27. He testified that valley Bakery Limited changed its name to Valley confectionary and re-employed him on 13th September, 2013, under the same position of a salesman earning a daily wage of Kshs 640. However, that he experienced the same issue with the 2nd respondent of customers who failed to pay for the goods and the Respondent blamed him for the loss of the said funds.

28. He indicated to court that he filed distribution sheet with the Respondent who carried out investigation to affirm the indebtedness of its customers which customers promised to make good the debt. The claimant stated that he was eventually terminated on alleged loss of funds

even after accounting for the distribution of the said goods and the failure of payment by the customers.

29. The claimant also testified that the respondent failed to remit his NHIF and NSSF deduction from September to December, 2012 which he prayed for service pay.

30. On cross examination he stated that he left employment with the 1st Respondent in the year 2009 and filed this case in the year 2015. He stated that he was not involved with the loss of the Kshs 118,000/- but still asked Flava Sacco to release his savings for the payment of the same. He insisted that he never admitted liability and on the loss of Kshs. 463,419.50 he stated that he never appropriated the money.

31. He also clarified that he stepped aside on 10th December, 2012 to pave way for investigation on the alleged loss of funds and was to be reinstated which never happened despite several demands.

32. The Respondent led one witness, **Evelyne Gathoni Maina**, the Respondent Human Resource manager who sought to adopt her witness statement recorded on the 5th July, 2021 which basically reiterated the Respondent's defence and counterclaim together with the list of documents filed on 23rd April, 2015.

33. On cross examination, she testified that the Claimant was first employed as a casual laborer. She stated that the Kshs 118,000/- was never paid in full by the claimant. On the Kshs. 15,000/- Paid in cash by the claimant she stated that there was no indication that the same was received by the company.

34. She also testified that Flava Sacco is a Sacco for member of the company but a separate entity from the Respondent. When asked whether the claimant was paid his overtime, she stated that the claimant was paid for the overtime worked at a rate of 15% of basic salary in accordance with the CBA which is captured in the claimant's payslips. She stated that the claimant was not subjected to disciplinary hearing. She also stated that the letter dated 28th October, 2006 indicates that the shortfall was received in full. The witness testified that the claimant's 2nd employment in 2011 was made by a different company in a different premise which is not them.

35. When asked about alleged embezzled funds, she stated that some customers admitted being in debts and even made arrangement of modes of repayments.

Submissions

36. The claimant submitted that under section 35(c) of the Employment Act, as read with Clause 5 of the Collective Bargaining Agreement for the period between 1st April, 2014 to 31st March, 2014 the Respondents were obligated to give him notice before termination.

37. The Claimant submitted that the cause of his termination was on the alleged embezzlement of funds which after investigations the Respondent affirmed that the said monies were debts that were still owed to them and the said customers signed against acknowledgment of debt form therefore the basis of his termination was flawed and therefore argued that the termination was unfair in the circumstances.

38. The claimant argued further that his dismissal was a constructive one, as the Respondent made him to step aside with a promise of reinstating him which never happened, in this he relied on the case of **Nathan Ogada Atiagaga v David engineering Limited [2015] eKLR**.

39. He also argued that although he was the one that sought to step aside, the same was informed by the actions of the Respondent who had made it difficult for him to collect the monies since most clients had been informed that he was under investigation for alleged embezzlement of funds.

40. According to the claimant his termination was unfair as he was not subjected to disciplinary hearing as provided for under section 41 of the Employment Act. In this he cited the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**.

41. He submitted also that the counterclaim raised by the Respondent has not been proved to the required standard as no evidence of the alleged embezzlement was established in accordance with section 107 of the Evidence Act therefore the counterclaim ought to be dismissed. He therefore urged this court to allow the claim herein.

42. The Respondent on the other hand submitted that the claim by the claimant arose out of summary dismissal that was made in March 2009 by the 1st Respondent, which case was filed in the year 2015 more than 6 years down the line. It was argued that the claim is statute barred as envisaged under section 90 of the Employment Act and cited the case of **Attorney General & Another v Andrew Maina Githinji & another [2016] eKLR**.

43. On whether the claimant's termination was unfair, it was submitted that the claimant's employment with the 1st Respondent is statute barred therefore untenable. However with regard to employment with the 2nd Respondent, it was argued that the issue of constructive dismissal was never pleaded by the claimant in his pleadings and only introduced during submission which is contrary to Rule 4 of this Court's Rules. The Respondent relied on the case of **David Wekesa Nambafu v Bob Morgan Service Limited [2020] eKLR**.

44. The Respondent submitted also that, it was the claimant who sought to step aside by his letter of 10th December, 2012 on his volition without any request by the Respondent. It was therefore argued that the claimant was not dismissed from employment but stepped aside and never reported back to work even after he was informed of the outcome of the investigations.

45. The Respondent concluded that the claimant having voluntarily stepped aside in his employment with the 2nd Respondent and failed to

report back to work authored his dismissal and therefore is not deserving of the orders Sought.

46. On their counterclaim, the Respondents submitted that they have demonstrated that the claimant embezzled its funds which he received from its clients and therefore the counterclaim ought to succeed.

47. I have examined the evidence and submissions of the parties herein. From the evidence of the parties herein, the claimant was employed by the 1st respondent in 2003 and dismissed in 2009.

48. This case was filed on 9/3/2019. In the circumstances of this case any claim or counter claim for or against the 1st respondent is time barred by virtue of Section 90 of the Employment Act 2007 which states as follows;

90. Limitations

Notwithstanding the provisions of [section 4\(1\) of the Limitation of Actions Act \(Cap. 22\)](#), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

49. What remains is the claim and counter claim for or against the 2nd respondent. There is no doubt that the claimant worked for the respondent since September 2011 to 10th December, 2012 a period of about one year. The claimant avers that he stepped aside to allow investigation into embezzlement of funds.

50. He avers that the respondents never called him back. The claimant has however not produced any documents to prove that he stepped aside.

51. The respondents aver that the claimant absconded duty which I believe is what the claimant calls stepping aside. No one had actually asked the claimant to step aside due to investigations. The respondents had their own disciplinary mechanisms and stepping aside was not one of them. It is my finding that the claimant left his employment on his own volition and therefore his claim for unfair dismissal is therefore not plausible and is disregarded.

52. On issue of counter claim, the respondent had indicated that the claimant failed to pay some money he had collected on behalf of the respondents.

53. On this issue, the claimant was able to prove that the money was held by the respondents customers and even the RW1 confirmed that they had traced some of these customers who made arrangements to pay up.

54. It is therefore my finding that the counter claim was not proved and is therefore dismissed.

55. On issue of remedies available to the claimant the claimant sought to be paid his service pay by the respondents.

56. The respondents however proved that the claimant was a member of NSSF and this is evidenced from his payslips that were produced in court.

57. The claimant is therefore not entitled to service pay by virtue of the provision of Section 35 (5) of the Employment Act 2007 which states as follows;

35.

(6) This section shall not apply where an employee is a member of—

(a) a registered pension or provident fund scheme under the Retirement Benefits Act ([No. 3 of 1997](#));

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund.

58. The claimant also sought to be paid his overtime. The respondent averred that the claimant was paid overtime by virtue of CBA then in force being CBA of 2012/2014. The claimant left employment on 10/12/2012 and this CBA was effective 1/4/2012.

59. The CBA provided that a driver and turnboy would be paid a fixed overtime of 15% of his/her basic pay each month in place of normal overtime.

60. The claimant didn't produce his payslip for the year 2011 to 2012 to show he was never paid the overtime. He exhibited other payslips

though and the respondents have averred that they paid him as per the CBA.

61. The respondent exhibited the payroll signed by the claimant and which shows that he was paid overtime. The claim for overtime is therefore not tenable.

62. The claim by the claimant therefore fails and is dismissed accordingly.

63. The claim for payment of his savings from Flava cannot be effected by the respondent as these are two separate entities and can only be sought from Flava directly.

64. There will be no order of costs.

DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ekesa holding brief for Konosi for respondent – present

Ouma holding brief for Mukua for claimant – present

Court Assistant - Fred