



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 650 OF 2019

WILFRED MUTWOTA.....CLAIMANT

VERSUS

MANAGING DIRECTOR,

BAKERY SOLUTIONS LIMITED.....1ST RESPONDENT

BAKERY SOLUTIONS LIMITED.....2ND RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondents seeking relief against the. He averred that he was employed vide an oral employment contract in September 2018 as a permanent employee. The Claimant averred that on or about 14th June 2019 by a letter, his contract of employment was terminated by the Respondent without any justifiable cause. He averred that the time of the termination of the contract he was being paid a monthly gross salary of Kshs. 85,000/- while his net salary was Kshs. 65,204/- per month. The Claimant avers that his 9 months stint of service was blemish free but however, the Respondent terminated his services without any justifiable cause and without following out fair labour practices and laid down procedures. He averred that in the dismissal letter dated 14th July 2019 the Respondent raised an allegation that the Claimant was unable to deliver services in his work but no hearing was given to the Claimant at all. The Claimant avers that the Respondent acted unfairly in his termination and contrary to the Employment Act. The Claimant gave the following particulars of unfairness as regards the Respondent.

- a) Failure by the Respondent to accord the Claimant the due process in terms of the relevant provisions of the Employment Act.
- b) Failure by the Respondent to disclose any/or exact accusations as leveled against the Claimant in the termination notice.
- c) Failure by the Respondent to accord the Claimant any/or appropriate notice to terminate employment.
- d) Failure by the Respondent to accord the Claimant any fair opportunity to state his case if indeed there was one, or any case at all and the need, if be, to defend himself if and/when the need arose.
- e) Failure by the Respondent to give the Claimant any sufficient notice to prepare for any alleged disciplinary case/hearing.
- f) The Respondent dismissing the Claimant for reasons which do not warrant dismissal or add up.

2. The Claimant avers that as at the time he was terminated from employment, and even to date, the Respondent did not pay him 6 months salary in lieu of notice and this amounted to clear gross violation of fair labour practices as envisaged under Article, 41(1) of the Constitution of the Kenya 2010. He averred that also his right to personal dignity, and psychological integrity were violated all occasioning substantial loss and damage. The Claimant avers that upon his employment, the Respondent was to deduct statutory payments that is NHIF, NSSF and PAYE. The Claimant further states that from 1st December 2018 he worked and delivered services so well that the Respondent arbitrarily gave him extra duties as a fleet supervisor as well as vehicle repair and maintenance overseer but the agreed salary increment for these 2 extra job description of Kshs 22,500/- net salary per month were never effected for months of December 2018, January 2019, February 2019, March 2019, April 2019, May 2019 June 2019 and the Claimant claims the same, being a total of Kshs. 180,000/-. The Claimant averred that during the period of work he never went for any leave, he worked overtime sometimes for 20 hours a day and was not paid overtime for a period of 8 months at rate of Kshs. 1,500/- per any day worked overtime as agreed and the Claimant claims the same, which totals to Kshs. 360,000/-. The Claimant further averred that the in the letter of termination, the Respondents pointed out the Claimant as a bad person, a thief, a con artist, an untrustworthy person and the Claimant claims damages for defamation of character, as the said letter cannot help the Claimant get another job as it is badly painted his character which isn't the case. The Claimant avers that there was breach of contract on the

Respondents part and thus claims damages on the same. The Claimant averred that despite a demand letter dated 9th July 2019, the Respondent is adamant and has refused to pay the Claimant any of his lawful dues. The Claimant thus prays for judgment against the Respondent for;

- a) A declaration to issue that the termination of Claimant's employment without according him a fair hearing and lacking proper, fair administrative procedure was unfair consequently void and unlawful.
- b) Damages for wrongful termination of employment.
- c) Special damages as enumerated hereunder,
 - i. Net salary for May 2019 (30days) = Kshs. 65,304/-
 - ii. Net salary for June 2019 (10days) = Kshs. 21,768/-
 - iii. Leave days equivalent to one month salary = Kshs. 65,304/-
 - iv. 6 months' salary payments in lieu of notice = Kshs. 391,824/-
 - v. Underpayment for 8 months @ 22,500/- x 8 = 180,000/-
 - vi. Aggravated damages for defamation of character in letter dated 14th June 19.
 - vii. Overtime at rate of Kshs. 1,500/- per day for 8 months totaling to Kshs. 360,000/-
- d) Interest at court rates on (a), (b) and (c) from the date of filling the claim.
- e) Cost of the claim and interest.

3. The Claimant attached to his claim his demand letter dated 9th July 2019, his dismissal letter dated 14th June 2019, his certificate of service dated 3rd May 2018, the letter of appointment dated 17th July 2015 from Beta Bakers Co. Limited, his certificate of service dated 29th May 2015 from African Retail Traders (2005) Limited, his diploma in business administration from Belmont International College, a diploma in sales and marketing – Kenya Institute of Business Training, his school leaving certificates as well as his KCSE result slip, his NHIF Statement for 2017-2019 and his NSSF statement from 2001 to 2019 showing payments made into his NSSF account.

4. The Respondent neither entered appearance nor filed a defence and the matter proceeded as an undefended cause. The Claimant testified that he was unfairly dismissed as an employee of the Respondent on 14th June 2019. He stated that he was not accorded an opportunity to defend himself and that he was not paid the salary for May and June 2019. He testified that he was told to go to Court if he so wished. The Claimant stated that he was not paid for leave and that he would work from 6.00am to 6.00pm and on Saturdays he would work 1.00am which was contrary to what they had agreed. He stated that his working hours were 7.00am to 6.00pm but this was not adhered to. He stated that the salary was a gross of Kshs. 65,000/- and was to be increased by Kshs. 22,500/- for the overtime worked monthly. He testified that they never paid. He stated that he was summarily dismissed and because he was entitled to a hearing which he never received he is entitled to the relief sought. He stated that the damages he suffered by the actions of the Respondent should be paid. The Respondent did not attend the hearing and that marked the end of the matter as far as oral hearing goes.

5. The Claimant submitted that the fact of his employment was evidenced by the dismissal letter as he had been engaged vide an oral contract. He submitted that the provisions of the Employment Act applied to him in terms of Section 2 of the Employment Act. He submitted that under Section 41 of the Employment Act he was entitled to a hearing prior to dismissal for the reasons advanced in the letter of termination by the Respondent. He asserted no opportunity to defend himself was given and that he was well within the terms of his service to require such a safeguard as provided for under Section 41. He submitted that the dismissal without notice fits within the purview of the decision in **National Bank of Kenya v Nguru Mutonya [2019] eKLR** where the Court held

“a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again

and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

6. The Claimant also cited the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** where the learned Judges of the Court of Appeal held that

There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.

The Claimant thus urged the grant of the slew of reliefs in his memorandum of claim asserting that his qualifications and his stints as sales manager in other companies whose documents had been exhibited in his claim showed vast experience in sales and marketing.

7. The Claimant was dismissed by the Respondent for failure to effect changes in sales and crates. He had been issued with a letter on 29th April 2019 and therefore the management felt it had no option but to terminate his services. From a reading of the letter the dismissal was on account of performance. As such, the issue for the Court to determine is whether the dismissal of the Claimant on 14th June 2019 was fair and within the dictates of the law. The Claimant was from the evidence adduced not given a hearing and in terms of Section 41, 43 and 45 of the Employment Act the dismissal was unfair and unlawful in the circumstances. No hearing was conducted and there is no evidence that the Respondent attempted to satisfy the requirements of Section 41 of the Employment Act at all. Having so found, what remedies would lie?

8. The Claimant suggests that he was injured in his character as a result of the dismissal and that he is as such entitled to relief. He asserts the letter of 14th June 2019 caused him untold anguish and portrayed him as a bad person, a thief, a con artist, an untrustworthy person. He however did not avail a witness to prove the allegations of injury to his character. It is not enough to plead that a reputation has been injured. Evidence must be led to show there was such injury to entitle one to enjoy the relief sought. As such on the aspect of injury to character there is nothing he presented to show he is entitled to this remedy. He also made a demand for unpaid leave but did not avail any proof to support this claim. His claims for overtime similarly fail as no evidence was led on this. I restate the following: employees have an obligation to notify the employer of adverse working conditions and not merely acquiesce to the conditions at work without a murmur and then come to Court to lament how poorly they were treated yet they did not document any grievance with their employer. He never issued a note to the employer seeking payment for overtime, there is no evidence he raised this issue at all during the period he was employed and as such it is not possible to ascertain whether he was paid or not paid for overtime worked. As such this aspect of the claim fails.

9. On the final analysis, it is clear the Claimant was not heard in terms of Section 41 and his dismissal was therefore unfair and unlawful entitling the Claimant to a modicum of relief in that the Court will grant him 3 month's salary as pay. There was no proof that he was entitled to notice beyond the one month notice that would apply in terms of Section 35 of the Employment Act. In the end result, Court enters judgment for the Claimant for the following:-

- i. 3 month's salary as compensation – Kshs. 195,192/-
- ii. One month's salary as notice – Kshs. 65,304/-
- iii. Costs of the suit based on the sums above
- iv. Interest at court rates on the sums in i) and ii) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2021

NZIOKI WA MAKAU

JUDGE