REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1849 OF 2016

NELSON OMBEVA.....1ST **CLAIMANT**

JOHN NJENGA MUTURI.....2ND **CLAIMANT**

VERSUS

KENYA MEAT COMMISSION.....**RESPONDENT**

JUDGEMENT

The claimants were employed by the respondent on 18th April, 2007 and 18th May 2011 respectively.

The 1st claimant was employed as a sales clerk earning a gross wage of Ksh.9, 775 and the 2nd respondent as a production clerk earning a wage of Ksh.17, 640 per month.

The claim is that the claimants were interdicted for 4 months on allegations of theft of company products. They were invited to a disciplinary hearing in the presence of union officials save they were not allowed to give any defence and when they requested to documents and records which were being relied upon by the respondent - credits notes, security guard records, numbers, these were not supplied.

On 7th march, 2016 the claimants were unfairly dismissed from employment without the due process and fair reasons contrary to the provisions of section 43 of the Employment Act.

The 1st claimant is seeking payment of the following dues;

a) Compensations for wrongful termination of employment;

b) Unpaid leave;

c) Notice pay;

d) Unpaid house allowance;

e) Certificate of service

f) Costs of the suit

The 2nd claimant is seeking the following dues;

a) Compensation for wrongful termination of employment;

b) Unpaid leave;

c) Notice pay;

d) Overtime pay;

e) Unpaid house allowance;

f) Certificate of service; and

g) Costs of the suit.

The 1st claimant testified that upon employment he worked diligently and was promoted to a sales clerk under a contract and earning Ksh.14, 775 including the house allowance.

In the year 2016 the respondent wanted to reduce its employees and therefore started looking for ways to dismiss them. The claimants were alleged to have stolen company property without evidence.

The claimants were interdicted and when called to the disciplinary hearing they requested for the documents with evidence of theft but none were supplied. The termination of employment was unfair as the reasons used were without evidence and the claims made should issue.

The 2nd claimant testified that he was a diligent employee with a clean work record last earning Ksh.23, 640 including a house allowance. The respondent alleged that he had conspired with other staff to steal and manipulate records which was not true as such allegations were without evidence. He was issued with a notice to show cause and in his reply he requested for the documents used to arrive at the allegations made but such were not supplied.

On 7th March, 2016 he was issued with notice terminating employment without payment of his dues and the claims made should be awarded.

Response

The respondent's case is that the claimants were found of gross misconduct where the 2nd claimant was found to have aided the pilferage of the respondents assets by colluding with other loader to raise fictitious goods return notes which were not supported meat products that were returned from van sales and subsequently used to raise credit notes and hence understated the expected cash from van sales which amounted to gross misconduct. The claimants were taken through a disciplinary process which adhered to the law they were supplied to goods return notes, security guard records, and numbers that the respondent relied upon during the hearing.

The response is also that the claims made by the claimant was without proof and should be dismissed with costs.

No evidence was called.

No work records are filed by the respondent.

Determination

The sanction of summary dismissal leading to termination of employment should only issue where the employer is satisfied there is gross misconduct on the part of the employee and pursuant to section 44(3) and (4) of the Employment Act, 2007 with regard to breach of the employment relations and for gross misconduct.

Such sanction should only issue upon the due process outlined under section 41(2) of the Employment Act, 2007. In the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** the court outlined the attendant procedures before termination of employment as follow;

> *The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.*
>
> *Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.*
>
> *Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.*
>
> **Philip Amwayi Wokinda versus Rift Valley Railways Limited [2018] eKLR** held as follows;
>
> **Section 44** *of the Employment Act which was invoked covers '**Summary Dismissal**' and in* **subsection** *(3)thereof allows an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.* **Subsection (4)** *then sets out various acts that may amount to gross misconduct so as to justify summary dismissal.* **Section 44 (4)...**
>
> *The Act goes further in* **section 41** *to lay out the procedure to be followed in matters of termination of employment, thus:-*
>
> > ***"1. Subject to section 42(1), <u>an employer shall, before terminating the employment of an employee, on the grounds of</u>***

misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

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." [Emphasis added].

Without the respondent calling any evidence, the court is left with the claimant's case unchallenged.

There are no work records filed by the respondent pursuant to the provisions of section 10(7) of the Employment Act, 2007 leaving the court with the claims outlined by the claimant uncontroverted.

The response that during the disciplinary hearing the claimants were accorded the due process of the law and supplied with material evidence with regard to the allegations made against them is left bare. The alleged fictitious *Goods Return Notes which were not supported by meat and meat products that were returned from van sales and subsequently used to raise Credit Notes and hence understated the expected cash from van sales* are not produced.

Where the alleged evidence was produced, such would have aided the court in analysing the claims. The allegations outlined in the notice to show cause dated 9th September, 2015 that;

> *On various dates between 23rd January 2015 and 19th August 2015 you aided the pilferage of Commission assets by colluding with the loaders to raise fictitious Goods Return Notes (GRNs) which are not supported by meat and meat products that have been returned from the van sales. The GRNs have subsequently been used to raise Credit Notes (CNs) and hence understating the expected cash van sales.*

To arrive at such an allegation and then apply the same to issue notice of summary dismissal, of necessity, the respondent must have had sufficient evidence and material, which is unfortunately denied of this court.

The evidence by the claimants that they asked to be supplied with the material and records used to arrive at the allegations made against them is given credence by such evidence lacking from the respondent in these proceeding. The duty in law to produce as outlined above in section 10 of the Employment Act, 2007 hence not addressed, credence is given to the claims that there lacked genuine, valid or justified grounds leading to termination of employment, see Court of Appeal in the case of **Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR** and in the case of **Kenya Power & Lighting Company Limited v Aggrey Lukorito Was ike [2017] eKLR** that the employer must have genuine and valid reasons leading to termination of employment, which is not the case here.

The court finds there was unfair termination of employment.

Taking into account the years worked, each claimant is awarded compensation equivalent to three (3) months gross wage pursuant to section 49 of the Employment Act.

Under section 35 of the Act, Notice pay is due in a case of unfair termination of employment.

On the claims for payment of a house allowance, both claimants outlined their evidence and each was paid a house allowance together with the basic wage. Such is not due.

Certificate of service should issue under the provisions of section 51 of the Employment Act, 2007.

The 2nd claimant testified that he had taken annual leave over the years save for the last year of service. Leave days where not taken are payable pursuant to the provisions of section 28 of the Employment act, 2007. The basic wage apply and the 2nd claimant is entitled to ksh.17, 640.

Accordingly, judgement is hereby entered for the claimants against the respondent in the following terms;

1. **1st claimant**
    a) **Compensation Ksh.44,325;**
    b) **Notice pay at Kshs. 14,775;**
2. **2nd claimant**
    a) **Compensation 70,920;**
    b) **Notice pay Ksh.23,640;**

c) **Leave pay ksh.17,640;**

3. **Each claimant shall be issued with Certificate of Certificate of Service; and**

4. **Costs of the suit.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021.

M. MBARU JUDGE