



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1206 OF 2016**

**JACOB MWEMA MALOMBE..... CLAIMANT**

**VERSUS**

**MOMBASA MAIZE MILLERS(NRB) LTD..... RESPONDENT**

**JUDGMENT**

1. Through a statement of claim, dated 20<sup>th</sup> June 2016, the Claimant sued the Respondent seeking for the following relief;

- (a) *A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.*
- (b) *The sum of Kenya shillings 471,625.00 particularized in paragraph 15 of the statement of claim.*
- (c) *Costs of this suit.*
- (d) *Interest on the amount awarded at court rates.*

2. On the 28<sup>th</sup> January, 2019, the Court noting that the Respondent had not filed any Response to the Claimant's claim despite being served with summons to enter appearance, directed that the matter be proceeded with as an undefended cause as a consequence.

3. On the 19<sup>th</sup> October 2021, when the matter came up for formal proof, the Claimant opted to rely on her witness statement that was contemporaneously filed with the statement of claim as her evidence in chief. He urged the Court to adopt the same as such, and the Court did. He further moved Court to admit all those documents that were filed under the list of documents dated 20<sup>th</sup> June 2016, namely, contract of employment dated 2<sup>nd</sup> January, 2007, contract renewal letters dated, 2<sup>nd</sup> May 2008, 2<sup>nd</sup> April 2009, 14<sup>th</sup> January 2010, and 16<sup>th</sup> March 2013, contract of employment dated 26<sup>th</sup> March 2015, bank account statements, recommendation letter by Bajabar limited dated 30<sup>th</sup> April 2016, certificate of postage dated 16<sup>th</sup> March 2016 and a demand letter of 16<sup>th</sup> March 2016, as his documentary evidence.

4. It was the Claimant's case that on or about the 2<sup>nd</sup> January 2007, the Respondent employed him as a Salesman at a salary of KSHS. 10,000 per a month. His working station being Wote Town, Makueni County. His duty entailed selling the Respondent's various products to various people.

5. The Claimant averred that he at all material times, discharged his duties with zeal and dedication, and this earned him contract renewals at various times and salary increment. As at the year 2015, his salary had gone up to KSHS. 24,500.

6. The Claimant contended that on or about 6<sup>th</sup> June, 2015, while on his way from Kibwezi town, and travelling in a private motor vehicle, he got involved in a road accident, with a resultant spinal injury. He was consequently taken to hospital. He reported the accident to his manager one Mr. Alphonse Ochieng' who then relayed the information to the Head Office.

7. He asserted that the Respondent's Human resource manager, one Mr. Beattah called him subsequently, and told him to take a 2 months sick leave because of the nature of his injury. As at the time the 2 [two] months sick leave period was ending, he had not fully recovered and was still undergoing treatment, prompting him to call the Human resource manager for an extension of the sick leave. Beattah, was okey with the request, he told the Claimant to report back once he fully recovered.

8. The Claimant further stated that he underwent treatment until around mid- October, 2015, when he started feeling better, and that all that time, the Respondent had stopped paying him his salary. At around this time, he went back to his place of work ready to continue with his duties, only to be instructed by Beattah to go home and wait to be called back. He further alleged that he went back on a number of occasions ready to resume duty, however he was not accepted back.

9. On the 3<sup>rd</sup> March, 2016, when he arrived at the offices of the Respondent, he was told to wait at the gate. The Human resource manager attended him from there, he informed the Claimant that he was no longer an employee of the Respondent for he had been replaced by another employee.

10. The Claimant asserted that his employment was therefore terminated without any justifiable reason. He further stated that the termination was, tainted with malice and, in breach of the contractual and statutory duty of care.

11. The Claimant contended that he was not given any, warning[s], termination letter, notification for any disciplinary hearing and opportunity to defend himself, before his employment was terminated.

12. That attendant to the termination has been loss and damage suffered by him.

### **Determination**

13. It was the Claimant's case that his employment was unfairly terminated as a result of his absence from duty, absence which was occasioned by his illness. In the case of **Banking, Insurance and Finance Union (Kenya) vs Barclays Bank of Kenya Limited (2014) eKLR** her Ladyship Justice Mbaru held:

*“The aspect of being ill is not a wrong in itself. What is wrong is not bringing the same to the attention of the employer and further being away from work without authorization or sharing information as to where the employee was. This amounts to absconding duty and a serious labour sanction follows as this is tantamount to negation of a contract of employment. An employee is taken to have abandoned his contract of service without notice to the employer. In the South Africa Labour court in SACWU vs Dyasi (2001) 7 BLLR 731 (inc) the Court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject, the acceptance of repudiation amounts to dismissal if the employee fails to render service. Failing to contact the Respondent constitutes unexplained absence for the period the grievant was away ..... Absence from work without a justifiable reason or permission and or authorization and notice to the employer is a subject for summary dismissal under section 44 of the Act.”*

14. In a matter where an employee is asserting as the Claimant herein did, that his employment was terminated unfairly as a result of his absence, absence occasioned by illness, it is duty upon such employee to demonstrate on a balance of probabilities that indeed he was ill, and that his employer was aware of his situation. It is after this that the Court shall delve into considering whether or not the employment was validly, fairly justifiably and equitably terminated.

15. The Claimant alleged that he got involved in an accident with a resultant spinal injury. That he was subsequently hospitalized and continued receiving medical attention for some time after the accident and hospitalization. It would not be off mark in the circumstances of this Claimant's alleged situation to reasonably expect him to place before Court, a police abstract (in prove of the alleged accident), treatment notes, discharge summary or medical bills payment receipts or a medical report, or a P3 form (all close to demonstrate the alleged hospitalization, the injury and its extent and the period of hospitalization).

16. Looking at the pleadings and evidence, one cannot fail to conclude that the issue was not given any serious efforts by the Claimant. The Claimant does not state the road along which the accident occurred, the police station where the accident was reported, the motor vehicle in which he was travelling, the hospital at which he got medical attention and for how long he was admitted. Absence of those details would give and gives a reasonable impression that the absence reason advanced by the Claimant was camouflaged.

17. The employer may have had a substantive reason to terminate the employment.

18. Having said this, I now turn to consider whether or not the termination for whatever reason it was, was procedurally fair.

19. Section 41 of the employment Act, provides for an elaborate and mandatory procedure that has to be followed whenever an employer considers to terminate the employment of an employee or summarily dismiss him. In sum the provision dictates that the employer's intention and the grounds forming basis of the intention be brought to the information of the employee and that the employee be accorded an opportunity to make a representation on the intention and the grounds. Therefore, there must be a notification and a hearing. In this view I am supported by the decision in **Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited (2014) eKLR**, where the Court stated that:

*“In the eventuality that an employee is to face summary dismissal or termination, section 41 of the Employment Act now dictates that there must be a hearing to give such an employee an opportunity to defend himself..... Section 41 of the Employment is coached in mandatory terms. ....where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing. .... The situation is dire, where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair.”*

20. The Respondent did not avail any witness to testify. There is no evidence therefore to challenge the Claimant's that the procedure was flawed, the stipulations of section 41 of the Employment Act were not adhered to. Consequently, I find that the termination was procedurally unfair.

21. Having found that the Claimant was not able to demonstrate that his absence from duty was as a result of illness, and that the Respondent may have had a valid reason to terminate, I am not prepared to award the one month's salary in lieu of notice.

22. The Claimant has sought for unpaid salary and sick leave allowance. Again, on that breath that he did not demonstrate to the requisite

standards that he was ill, I decline to make any award under these two heads.

23. Section 49 (1) (c) of the Employment Act bestows upon this Court powers to award a compensatory relief, where it has found that an employee's employment was unfairly terminated. I am inclined to make an award to an extent of two months' gross salary, and in so awarding, I have considered that liability is only attaching against the Respondent on account of a flawed procedure only, and the Claimant's contribution to the termination situation. Under this head, I award Kshs. 49,000 therefore.

24. In the upshot, Judgment is hereby entered against the Respondent on the following terms:

**(a) That the termination was procedurally unfair.**

**(b) Compensation pursuant to section 49 (1) (c) of the Employment Act, two months' gross salary – Kshs. 49,000.**

**(c) Costs of this suit.**

**(d) Interest on (b) above at Court rates from date of filing suit, till full payment.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of;

Ms. Owuor for the Claimant.

No appearance for the Respondent.