



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

CAUSE NO.45 OF 2019

THOMAS KIMELI KIMAIYO.....CLAIMANT

VERSUS

CHOPPIES ENTERPRISES KENYA LIMITEDRESPONDENT

JUDGEMENT

The claimant was on 9th May, 2017 employed by the respondent as a general workers at the Kericho branch in the stores division and was occasionally allocated work in various locations/divisions/departments until 27th June, 2018 when his employment was terminated by summary dismissal. The claimant was supervised by Leonard Nyaburi Owino.

The claim is that the supervisor would take several photographs of the claimant without consent. This caused the claimant unease while at work and he made a report to the police on 30th January, 2018. The supervisor summoned the claimant and warned him he would be dismissed for making a report to the police.

On 30th January, 2018 the claimant was issued with a show cause notice to reply within 24 hours.

There was another warning issued on 28th February, 2018.

While reporting to work on 14th June, 2018 police made impromptu visit to the respondent Kericho branch and conducted a search resulting in 3 crates of soda being found and which were said to be expired. The manager Mr Bhaumik was summoned to attend at the police station for questioning. Following the incident the claimant was summoned to explain how the 3 crates of soda had been received in the store but the claimant had no knowledge of such matter as all sodas had been received 3 weeks prior and accepted.

On 16th June, 2018 the manager Mr Japil and the supervisor Nyaburi summoned the claimant and his work colleagues Evans Luvember, Kihara Ngugi, Hick Simiyu and Heroli Nyandikizi to discuss and agree how the sum of Ksh.100,000 allegedly demanded by the police from Kericho police station to settle the matter on expired sodas would be recovered from them. The claimant demanded to be shown how the payment of Ksh.100, 000 by the respondent to the police had been made and why he had to be held responsible and surcharged. At the end of the meeting the respondent's officers directed the claimant and his workmates to sign and acknowledge being indebted to the respondent for the sum of Ksh.20, 000 each which the claimant declined to do.

The claimant was victimised for his refusal to accept the debt and on 18th June, 2018 was issued with a notice to show cause. He was summoned for disciplinary action and upon request to have the CCTV camera recordings replayed to ascertain the claims that he allowed the storage of expired sodas this was not done. The respondent then made a finding that the claimant should be summarily be dismissed from his employment.

The claim is that there was no due process in the termination of employment. Section 41 and 45 of the Employment Act were not followed. The alleged actions of failure to pay for a debt unknown to the claimant did not comprise matters set out under section 44 of the Act. There was unfair termination of employment.

The claim is for the following dues;

- a) Notice pay at Ksh.21,000;
- b) Unpaid leave for the year 2018 Ksh.21,000;
- c) Unpaid salary for June, 2018 ksh.21,000;

- d) Damages for breach of contract Ksh.252,000;
- e) Compensation for unfair termination of employment Ksh.252,000;
- f) Costs and interests.

The claimant testified that by notice dated 27th June, 2018 his employment was unfairly terminated by summary dismissal. The reason given that he had received expired sodas was not true as he was just a general labourer at the stores offloading goods and his duties involved carrying and receiving goods. He was dealing in records keeping and only carrying what had been received upon delivery. At the time of summary dismissal he was placed in stores and would collect goods at the staircase to the stores.

The claimant also testified that his colleagues Evans Luvember, Kihara Ngugi, Hick Simiyu and Heroli Nyandikizi were in soda line receiving or in stores. The allegations that the claimant received and parked expired sodas is not true as he only parked what was received in stores.

The claimant also testified that upon being issued with a notice to show cause without details he attended before the committee comprising the union secretary general, there was a shop steward and the manager. Also called for the same hearing were his colleagues Evans Luvember, Kihara Ngugi, Hick Simiyu and Heroli Nyandikizi. The respondent directed that each should pay ksh.20, 000 as Mr Bhaumik had been arrested and the police demanded for the payment of Ksh.100, 000 by the respondent. The respondent alleged that the receiving goods employee had known about the expired sodas but this was not true.

The claimant also testified that the health inspection and checks conducted at the department was his first experience with the police and Kenya Bureau of Standards. When the inspection was done he had been waiting to start his shift. At the end of the inspection the team produced 3 crates of sodas and said these were expired. He has no knowledge of what became of these goods after the inspection. There were no charges levelled against the management and upon the summoning of Mr Bhaumik by the police he later returned and resumed work. The claimant was then interrogated over the matter as to why he had received expired goods in the stores. Other colleagues in the department were also summoned and the manager with the supervisor directed that each should pay ksh.20, 000 to which the claimant refused and this led to termination of employment.

Some of his colleagues - Evans Luvember, Kihara Ngugi, Hick Simiyu and Heroli Nyandikizi – accepted to pay for the debt.

The claimant also called Mr Abdullah Kiptanui the Branch Secretary of Kenya Union of Commercial Food and Allied Workers Union, Kericho and the National Chairman of the union and who testified that upon receipt of letter and notice of suspension dated 18th June, 2018 copied to the union the claimant reported the matter to the union branch and together with other union officials he attended the disciplinary hearing on 22nd June, 2018. Present were 4 colleagues of the claimant, the shop steward, the supervisor Mr Nyamburi and the manager Mr Jipil and Rehema an official of the union.

Mr Kiptanui also testified that the respondent's officers were pushing the claimant to accept a deduction of Ksh.20, 000 out of his salary so as to repay that amount which the management altered to have been paid to the police to secure the release of Mr Bhaumik who had been arrested at Kericho police station following the seizure of expired goods at the branch. That Mr Bhaumik confessed a sum of ksh.100, 000 had been paid to the police. The requirement on the claimant was an injustice.

Mr Kiptanui also testified that later he learnt that the claimant had been dismissed from his employment.

Defence

The defence is that the claimant was employed on 26th September, 2016 as a general labourer, off loader in stores division and not on 9th May, 2016 as claimed. There was a letter of offer of employment issued.

The defence is that upon signing a CBA No.371 of 2017 registered and taking effect on 1st September, 2017 the positions were upgraded to shop assistant.

The claims that there were photographs taken without consent are matters not addressed with the respondent. No such grievances were raised. The police have never summoned Mr Nyamburi over the same.

The claimant was summoned by his supervisor when he reported to work with a dirty dust coat, was found idling at work and was insubordinate. He was then issued with a warning letter on 28th February, 2018.

On 14th June, 2018 the claimant reported to work, two police officers also came into the shop but were not accompanied by health officers not KEBS for conducting the alleged impromptu inspection. The claimant clocked in at work and directed the officers to the stores where 3 crates of expired sodas were discovered kept separately from others. These sodas had not been displayed for sale and the claimant had not informed the respondent that he was keeping expired goods separately. The police officers then collected these expired goods from the store and asked the assistant manager to accompany them to the station. The officers did not issue a seizure form to the respondent indicating they had collected these goods from the branch as required under the regulations.

The defence is also that it is not an offence to have expired goods in the stores provided these are kept separately from other goods and not mixed with goods meant for sale. The separation is to allow a return to the supplier or for a certificate of destruction.

The claimant admitted to these matters in his response to the show cause notice. He however had not informed management of these expired goods until the police came into the stores and later arrested the assistant manager.

The claimant had been present when Equator Bottlers Limited (Coca Cola) had delivered these goods. From his parking and separation of goods the claimant was aware of the 3 expired crates of soda but failed to address with management.

The claimant in his response admits he knew the 3 crates of soda were expired and he kept them separate in the stores. He was informed by Steve Biko that this had been resolved with Equator Bottlers but he failed to inform the respondent about these matters. The claim that there was a requirement to pay ksh.20, 000 from the total Ksh.100, 000 alleged bribe is not true. The notice to show cause issued to the claimant was with details and invitation to attend disciplinary hearing.

The defence is also that the claimant had had a long history of indiscipline. By letter dated 29th March, 2017 he apologised following incidents on 23rd March, 2017 and on 29th March, 2017 over lunch sheets he had refused to sign. This was addressed and settled.

Following events of the discovery of expired sodas at the stores the claimant was issued with a show cause notice and given a hearing in the presence of union officials and the shop steward. Summary dismissal was done in accordance with section 44 of the Employment Act. The respondent followed the applicable CBA.

The claims made are without foundation and should be dismissed with costs.

In evidence the respondent called Kenneth Kadiro Mugamangi the floor head with the respondent and who testified that his duties are to supervise operations at the shop floor and assign staff with duties.

On 14th June, 2018 he reported on duty and found police at the shop. Whenever there is an issue, the police report to management but in this case they came and went directly to the stores where they found the claimant and came back with expired goods, 3 crates of sodas. There was no search and found the 3 crates of sodas kept separate from other goods.

The claimant had the duty to check goods stored in the store. He was required to check the expiry dates. The police left with the expired goods without taking or making a record of these goods. The procedure requires that whenever there are expired or damaged goods, removal from the shop should be through a set procedure which was not followed. The goods once identified must be kept separate for a report to the supplier or destruction upon issuance of the certificate by the health department.

When the police took the goods the manager was also summoned and required to attend at the police station. There is no record that a sum of Ksh.100, 000 was paid and that the claimant was required to pay part of this money. The claimant had a record of indiscipline and the claims made are without merit.

At the close of the hearing both parties filed written submissions.

By letter dated 27th June, 2018 the respondent terminated the claimant's employment by summary dismissal on the grounds that;

... You were found to have failed to check the expiry kept three crates of expired sodas in the store. Taking into consideration of the gravity of exposing our unsuspecting customers to expired products by your failure either by negligence or intent.

...

You are aware that the above charges amount to gross misconduct as per the provisions of sec 44 of the Employment Act 2007. ...

Section 44 of the Employment Act, 2007 (the Act) allow an employer to terminate employment by summary dismissal where the employee is found to be in breach of fundamental provisions of the employment contract and is of gross misconduct. The employer is allowed to issue notice and hear the employee through on short timelines pursuant to the provisions of section 41(2) of the Act. Such is what would comprise procedural fairness, the due process envisaged under the law as held in **George Onyango Akuti versus G4S Security Services Kenya Ltd [2013] eKLR**.

Save for the procedural fairness, the employer is under the provisions of section 43 of the Act required to ensure substantive justice. That the reason(s) for termination of employment are both genuine and fair. In **Moses Daniel Kyalo versus Trendsetters Tyres Limited [2019] eKLR** the court held that;

Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure on the other hand, includes but not limited to, granting a fair hearing to the employee before termination.

See also **Lydia Wambui Wahome versus 2NK Sacco Society Limited & Another [2017] eKLR** the court held that even where there is a genuine reason to terminate employment the same must be addressed with fairness and be valid upon a reasonable test. See **Liz Ayany versus Leisure Lodges Limited [2018] eKLR**.

In this case there was summary dismissal as set out above on the grounds that the claimant was found to have failed to check the expiry of 3

crates of sodas in the store he was manning and thus exposed such products to unsuspecting customers through negligence or intent.

Before the sanction of summary dismissal, the claimant was issued with a notice to show cause why his employment should not be terminated to which he replied vide letter dated 20th June, 2018 that;

... I was present when Equator Bottlers was being received. After receiving, I and other workers we were told to clear the receiving are... all sodas were taken to down stores so as to give time to line man to select the ends which will go to the line for sale.

We were told to remove all the sodas which were almost to expire from the store and line for return and in the store there was no any 500ml soda since it was out of stock. ...

The claimant is described by the respondent as a general labourer – off loader in the stores division.

In the letter of offer attached as annexure “RV01” to the defence, the terms and conditions of employment as general labourer – off loader are that the *terms and conditions of employment are contained in the contact of employment, a copy of which is to be made available to you.* Save for the CBA attached, the terms and conditions issued to the claimant for his employment as a general labourer – off loader is/are not made available to the court.

The duty of checking the expiry date for sodas in the store for a general worker – off loader is a duty which is both technical and requires a speciality not to be assigned to a general worker unless there is specific guidance and direction by a senior officer conversant and knowledgeable with such matters. To require a general worker – off loader of the nature of the claimant to ascertain the expiry dates of sodas in a general shop such as the respondent supermarket is both irrational and unreasonable.

The court has taken due regard to shop goods in the nature of sodas sold at a general shop. It is impossible to ascertain the expiry date of such goods unless there is guidance by an expert or specific intent to trace and track such dates. In most of the sold sodas the expiry dates are not visible is available at all.

The rationale is that the duties of a general labour vary and dependent on work allocation by the employer without any specific qualification as such requires strict supervision. That is the basis of the Wage Orders issued by government to regulate the wages paid to general labourers to avoid exploitation and or payment below the minimum. The purpose is to ensue allocation of general work.

In this regard, the claimant would be allocated duties in the stores, offloading, in the lines and as the employer and respondent found necessary. He was not with any given expertise to allow whim to undertake an assessment of the goods in the stores to ascertain the expiry dates of such goods. To require him to undertake such a duty would be to apply an unreasonable requirement. Without any service contract which allocated such specific duty and role to the claimant, he remained a general worker.

The court takes it that the respondent as a chain supermarket had various officers in the movement of goods from receiving, offloading, carrying to the stores, keeping records and making such good available on the lines for customers to pick and purchase. In this line of movement of goods there are records. The records taking account ton expiry goods such as sodas in the stores if at all kept by any given officer and or was allocated to the claimant was not clarified.

The defence was also that on 14th June, 2018 the police came to the Kericho branch without the KEBS officers and proceeded to the stores where they collected 3 crates of sodas which were expired. They did not have the required documents for the collection of such goods and for the inspection.

This then begs the question as to why the respondent, well aware of the process of seizure of expired good and or damaged goods allowed for the same not to be procedurally addressed with the police or with KEBS and instead chose to sanction the claimant over the same. Where indeed the police overlooked the due process and proceeded to enter, seize and carry away goods from the shop, then recourse was not to sanction a general worker.

It cannot therefore be for the claimant that as the last in the chain of receipt of goods in the stores is the one who was found to have;

... you were found to have failed to check the expiry kept three crates of expired soda in the store. Taking into account the gravity of exposing our unsuspecting customers to expired products by your failures either by negligence or intent. ...

To build a case of *negligence* against the claimant the respondent was of necessity required to proof that there was a duty upon the claimant to monitor the expiry dates of goods in the store he manned; that he breached such duty; and that as a result of such acts of omission and or commission, the respondent suffered damage and which then led to the breach of the contractual duty upon the claimant in the performance of his duties. See **Isinya Roses Limited versus Zakayo Nyongesa [2016] eKLR**. a casuistic link to the responsibility bestowed on the employee under his contract to service must be established. It cannot be general requirement that he was expected to do a given duty which he failed to attend and thus a case for summary dismissal. See **Stakeley Iron and Chemicals Co. Ltd v Jones [1956] AC 627**.

In employment and labour relations, there is a fundamental difference between negligence and poor work performance. In **Kenya petroleum oil workers union versus Kenya petroleum refineries Ltd [2013] eKLR** the court delved into this issue as follows;

It is necessary for the Court to very briefly discuss what poor performance within the employment relationship connotes. This is because it is very easy to discern what a poor performance in a drama play is but not in the workplace. Many employers confuse poor performance with negligence, incapacity or misconduct.

Poor performance does not relate to an employee's behavior in the work place. Behaviour is addressed under misconduct in employment disciplinary process while poor performance examines whether the job which an employee is expected to perform is performed properly (ability).

Performance is therefore gauged on the basis of sufficient job output, acceptable quality, compliance with employer operating procedures, sufficient employee effort and ability to perform the job at the expected level.

Therefore in this case, both the cited *negligence* and *poor work performance* of the claimant cannot be applied in the same vein to mean the same matter. One has to give way for the other or have each addressed with demonstrated evidence.

Without any record that the claimant was under any other work regulations requiring him to be conversant with the duty of *checking the expiry kept of expired sodas in the store* to apply such measure to summarily dismiss him from his employment is to apply an unfair yardstick. Fair labour practice requires that where the terms of employment are changed to have the employer issue the employee with the changes in accordance with section 13 of the Act.

Also to single out the claimant from the stores department and require him to keep the record of expired goods in his duties as a general labourer is to raise the bar of his general duties without any form of training, direction, coaching or guidance. From the records and disciplinary hearing it was noted as follows;

... *further investigations reveal the following*

(1) When the Coca Cola delivered the said expired goods, the staffs at the receiving overlooked the expiry date issue. Mr Kimaiyo [the claimant] was at the receiving at the time.

(2) When the official from the KEBS had carried out the raid and confiscated the said soda, the staffs concerned including Kimaiyo conspired and swore never to tell the truth to the management. This is proven in the manner in which all of them denied initially.

(3) When finally the CCTV revealed everything, Kimaiyo who had accompanied the police out of the point where the soda were kept in the storeroom and had earlier denied being there said he had not been trained on how to work in the storeroom.

...

In summary

(1) Kimaiyo ignored the operational proceedings that requires each and every staff handling perishable or food items to always be alive to expiry dates especially when arranging them on the shelves or in the storeroom. ...

As noted above, the claimant did not act alone. He received the subject goods to the store with others whose role is not explained. There were operations proceedings that requires every staff handling perishable or food items to be alive to. These operational procedures are not outlined.

In the circumstances of this case, the sanction of summary dismissal against the claimant is found without justification. Employment terminated unfairly.

On the above findings, the claimant is entitled to notice pay and compensation. In the claim the claimant is seeking notice pay at ksh.21, 000 while in the letter o employment his gross wage is ksh.11, 623 per month. This disparity is not addressed by either party in the written submissions. The record of the respondent as the employer shall suffice. Notice pay is hereby awarded at one (1) months gross wage at ksh.11, 623.

With regard to compensation, section 45(5) of the Act obligates the court to put into account the disciplinary history of the employee while assessing the compensation to be awarded. There is a record of warnings to the claimant which are not challenged in any material way. The claimant admitted to being issued with show cause notice dated 30th January, 2018; A show cause dated 23rd March, 2017;

His letter of apology dated 29th March, 2017; and a warning dated 28th February, 2018.

These put into account an award of 3 months gross pay in compensation is hereby found appropriate all at ksh.34, 869.

On the claim for damages for breach of contract, with the award in compensation in an employment and labour relations claim, under the provisions of section 49 of the Act, the unfair labour practice is thus addressed.

The claims for leave days not taken and unpaid wages for June, 2018 the respondent did not give evidence of having paid these dues. a record of these payments would have been sufficient but these are lacking.

Annual leave where due is payable based on the basic wage awarded at ksh.10,107. The wage due for June, 2018 the claimant having worked until the 27th June, 2018 he is entitled to ksh.10, 460.

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

(a) Compensation awarded at ksh.34,869;

(b) Notice pay ksh.11,623;

(c) Leave pay ksh.10,107;

(d) Wage for June, 2018 Ksh.10460;

(e) Certificate of service shall issue in accordance with section 51 of the Employment Act, 2007;

(f) 50% of due costs.

Delivered at Kericho this 30th day of January, 2020.

M. MBARU

JUDGE

In the presence of: