



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.256 OF 2017

ALLAN BILABILI KILAINI.....CLAIMANT

VERSUS

WOOLMATT LIMITED.....RESPONDENT

JUDGEMENT

The claimant was first employed by the respondent in November, 2000 to arrange merchandise on the shelves of the respondent supermarket at a salary of Ksh.840.00 per week and paid weekly and later he was given the position of a general labourer from the year 2002. Work hours were 7am to 7pm from Monday to Saturday and on Sunday from 9am to 3pm without an off day.

The claimant worked as a general labourer until May, 2007 he was promoted to a shop assistant at a basic wage of Ksh.4,440.00 and house allowance of Ksh.666.00 per month.

In December, 2008 the wage was increased to Ksh.5,321 and house allowance Ksh.798;

In March, 2010 the wage was increased to Ksh.7,223 and house allowance to Ksh.1,083;

In July, 2011 to May, 2012 the wage was Ksh.8,938 and house allowance Ksh.1,341;

In June, 2012 to April, 2013 wage was Ksh.10,109 and house allowance Ksh.1,517;

In May, 2013 the wage was Ksh.10,109 and house allowance Ksh.1,517;

In May, 2013 the wage Ksh.11,524 and house allowance Ksh.1,729.

In May, 2014 the claimant was promoted to receiving goods in the supermarket on the same wage but with duties of a general clerk until his employment was terminated on 17th December, 2016.

The claim is that there was underpayment when the claimant worked as a shop assistant from the year 2010 and from January, 2015 when he was a general clerk and after working for the respondent for over 16 years.

The claim is also that on 12th December, 2016 the claimant went to check his bank balance in respect of his November, 2016 wage from the PDQ at the shop as the respondent is the agent of Umitas Bank. The claimant checked by running the Umitas visa card on the PDQ machine and got two receipts and he had a balance of Ksh.4,450 which meant his wage had not reflected into the bank account. He took the receipts to the cashier who paid him the amount of ksh.4,450.

Two days later on 14th December, 2016 the claimant was informed by one George Olembe the manager that he was required in the office since he was alleged to have operated PDQ machine and captured on CCTV camera. At the office was the manager, Mr Chege in charge of security and was required to explain his use of the PDQ machine and he admitted to using it as was the practice to access his wages and that he had been assisted by Mr Okumu and Ms Irene. The claimant then was directed to explain himself in writing which he did but on 17th December, 2016 he was issued with letter terminating his employment with the respondent. He lodged an appeal with communication to his union and upon concerning a meeting with the respondent on 23rd December, 2016 with the human resource manager Mr Kamau it was resolved there was no offence committed to warrant the termination of employment and there would be communication to the claimant and the union in 2 days but the response was to confirm the termination of employment.

On 30th January, 2017 the claimant's union was granted a hearing but the parties did not reach an agreement. The claimant was then paid Ksh.127,384 but was not satisfied as these dues were sent to his bank account without consulting him and he ended up without any payment as these dues were applied to offset a loan he had with the bank.

The claimant is seeking the following dues;

- a) Underpayments ksh.89,932.80;
- b) Service pay for 16 years ksh.142,392.50;
- c) Pending leave days ksh.26,924.60;
- d) Overtime (1) Ksh.1,720.50;
- e) Overtime (2) Ksh.1,798.80;
- f) Notice pay Ksh.15,426.40;
- g) 17 days' pay for December, 2016 Ksh.10,086.10;
- h) Bonus Ksh.1,000.00;
- i) Compensation;
- j) Certificate of service; and
- k) Costs.

The claimant testified in support of his claims.

The defence comprise mere denials save that the claimant was employed as a general labourer in the year 2002 and deny the alleged promotions and that there is no such evidence. that the claimant breached the laid down rules and regulations when on 12th December, 2016 while acting without authority he operated a Process Data Quickly machine (PDQ) and withdrew ksh.4,500 and was captured on CCTV camera and which amounted to gross misconduct. such PDQ machine is solely availed in the shop for customer use to facilities shopping with ease and only 4 employees are authorised to operate the machine and a fact well known to all employees. The claimant thus knew he was committing an offence when using the PDQ machine.

On 13th December, 2016 the CCTV cameras were reviewed and the claimant invited to show cause why disciplinary action should not be taken against him for the offence of withdrawing money from the PDQ machine and upon considering his responses a decision was taken to dismiss him for gross misconduct. the claimant was allowed an appeal which was found without merit and his union was invited for a meeting and his terminal dues paid through his bank account all being ksh.207,710 being salary for December, 2016; overtime pay house allowance, bonus, service pay and notice pay.

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

In evidence the respondent called George Orengo Okelo the branch manager, Nakuru and who testified that he worked with the claimant who was found to have used the PDQ machine on 12th December, 2016 without authority and contrary to the laid down regulations and from the system he accessed and withdrew money. Such PDQ machine was not for use by employee but the customers to buy goods and by the claimant using it to withdraw cash the respondent was put to an expense. The CCTV were reviewed and the claimant had no authority from Mr Okumu who had access to the machine.

Fredrick Okumu also testified that he worked with the claimant and on 12th December, 2016 he did not authorise him to use the PDQ machine as alleged. A review of the CCTV camera footage do not show him helping the claimant to access the PDQ machine and money as alleged. Such machine is only used by the customers to buy goods from the supermarket and not to employee to withdraw cash without buying any goods. There are rules and regulation on the use of PDQ machine and only designated employees have access.

Irene Nduta also testified that she worked with the claimant and is the one other person authorised to use the PDQ machine. She learnt that the claimant had used the machine to withdraw cash which was not allowed.

Lucy Wacuka also testified that she is the human resource officer at the respondent and upon information that the claimant had violated the rules and regulations with regard to the use of the PDQ machine to do a cash back instead of purchase of goods as required he was issued with a notice to show cause and invited to a hearing and upon which he pleaded for forgiveness and noted his mistake in the use of the PDQ machine but he was found of gross misconduct and his employment terminated on good cause. He was allowed an appeal which was dismissed. His trade union held discussion with the respondent and terminal dues were settled and nothing owes.

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

By letter dated 17th December, 2016 the claimant was terminated in his employment with the respondent on the grounds that;

... the CCTV footage captured on 12th December, 2016 your statement dated 14th December, 2016 and our subsequent meeting held on 16th December 2016 and confirm that on 12th December, 2016 you without permission operated the PDQ machine and transacted a cash back KES 4,500.00 which you proceeded to get the liquid cash from the cashier. You are hereby advice that your services shall be terminated with effect from 17th December, 2017 unless sufficient cause is given.

In this regard, the claimant testified that it was the general practice for employees at the respondent business to check their bank balances using the PDQ machine and the visa card and access cash by using the PDQ receipt to the cashier who would confirm and encash the same. The claimant also testified that in this regard he was assisted by Mr Okumu who had access to the PDQ machine but Mr Okumu denied these averments. Ms Irene also testified that there were only 4 employees authorised to use the machine.

Section 43 of the Employment Act, 2007 allow an employer for good cause to terminate the employment of the employee for reasons that at the time of taking such action the employer genuinely believed that there is such good cause. However, section 45 of the Act requires the reasons for termination of employment to be valid and fair in the circumstances of each case.

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, the claimant does not deny his use of the PDQ machine to access cash on the 12th December, 2016. He admitted that this was the general practice within the employees of the respondent. indeed he used the PDQ machine and using the receipts therefrom the cashier paid him the sum of Ksh.4,400. This is not contested by the respondent save to assert that the claimant breached the rules and regulations on the use of the PDQ machine as he was not authorised to use such machine.

The rules and regulations issued to the employees on the use of the PDQ machine is not made available to the court. upon examination of the manager by the claimant's advocate he was not able to explain this aspect and how the employees were required to comply with rules and regulations which were not documented or issued to them. the human resource officer Ms Wacuka also could not explain this aspect as to which *rules and regulations* were applicable on the use of the PDQ machine.

The fact that the claimant was able to access cash from the cashier on the material date using the cash balances accessed through the PDQ machine, his defence of the use of the same is found reasonable and without any shared rules and regulations on how such use was a=unauthorised, the parameters for use and non-use by the employees, effectively the respondent failed to address the provisions of section 12 of the Employment Act, 2007. The employer has the duty to bring to the attention of its employee any disciplinary rules and regulation and other matters with regard to work place conduct.

The court finds the reasons used to terminate employment lacked reasonable cause and validity. Such resulted in unfair termination of employment contrary to section 45 of the Employment Act, 2007. Compensation is due and under the provisions of section 45(5) of the Act the court is required to consider the work history of the employee, the claimant had a litany of misconduct during the period of his employment with the respondent and putting these into account compensation is hereby assessed at one month gross wage all at Kshs. 14,844.00.

On the claims made, the claimant has since been paid the sum of Ksh.207,710.00 for;

- 1) Notice pay Ksh.14,844;
- 2) Salary for December, 2016 Ksh.12,907;
- 3) Overtime total Ksh.3,346;
- 4) Housing Ksh.1,937;
- 5) Bonus Ksh.1,000;
- 6) Service pay Ksh.145,380;
- 7) Leave due Ksh.28,284.

These dues are with evidence in the payment statement for December, 2016 and deposited in the claimant's bank account which he confirmed went into Unitas Bank and used to offset a loan therefrom. Such then removes the respondent from taking account over any

monies due from the claimant and his bank. The respondent made good its duty that far.

With regard to the claim for underpayments, the basis is that the claimant was promoted over the years and in such promotions his wage was not paid commensurate to the position(s) held. Section 10 and 13 of the Employment Act, 2007 places the duty upon the employer to keep work records and where there is a change in employment particulars to issue the employee with written details. The assertion herein by the respondent is that the claimant was a general labourer and such title did not change and he was paid accordingly.

Without any written statement of a change in job title, the payment statements submitted, the claimant thus remained a general labourer and paid accordingly and in tandem with the Wage Orders. To claim there was underpayment without proof of any written change of employment particulars is without justification. There is no underpayment.

On the payment statements the respondent paid statutory dues to NSSF and NHIF. In the payment of final dues, the bulk of it is service pay. This is a generous payment noting this was not due to the claimant. The claim for service pay is not justified.

Leave, overtime, pay for days worked in December, 2016, bonus and notice were all paid. The use of such amounts to offset the due loan owing is between the claimant and his bankers.

A certificate of service has since issued and a copy filed with the defence.

Accordingly, save for compensation at Kshs. 14,844.00 the claims made are found without merit. Each party shall bear own costs.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBARU

JUDGE