



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1635 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 16<sup>th</sup> January, 2020)**

**BISMARCK SAMMY MWENDWA .....CLAIMANT**

**VERSUS**

**LIKAT BOUTIQUE LIMITED .....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed a Memorandum of Claim dated 16<sup>th</sup> September 2015, where the Claimant states that he was unlawfully and unfairly terminated from the Respondent's employment. He further contends that the Respondent failed and/or ignored to pay his terminal dues and compensatory damages at the time of separation.
2. In his Memorandum of Claim the Claimant avers that he was employed by the Respondent herein a limited liability company on 6<sup>th</sup> December, 2010 as a sales assistant earning an average salary of Kshs. 12,000/- per month.
3. He further avers that he performed his duties diligently and to the Respondent's satisfaction until 21<sup>st</sup> June, 2013 when he was arrested at the Respondent's premises on false and unsubstantiated allegations that he had stolen from the Respondent a pair of shoes.
4. He further contended that he was taken to Kamkunji Police Station where he was released on cash bail of Kshs. 5,000/- and was further verbally informed by the officer incharge to report to Makadara Law Courts on 25/06/2013. He further contended that on the said date he was informed that his file was not in Court and that there were no preferred charges against him.
5. The Claimant further contended that he did report back to work on 3<sup>rd</sup> July, 2013 and talked to one of the Respondent's manager one Mr. John Mwaura, who informed him to go home and await the Respondent's decision regarding his duties. He further contended that he was never called to resume duties and was instead informed via text message to return his uniform.
6. The Claimant avers that this act by the Respondent was contrary to the provisions of the Employment Act as he was not accorded a fair hearing prior to his termination.
7. Aggrieved by the decision to unfairly terminate his services the Claimant filed the instant claim seeking the following reliefs:-

***a) A declaration that the Respondent's aforesaid actions amount to unlawful summary***

*dismissal from employment.*

*b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.*

*c) An Order that the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs. 186,000/-*

*d) Interest on (c) above from the date of filing suit till payment in full.*

*e) Costs of this suit plus interest thereon.*

8. The Claimant urges the Court to allow his claim as drawn.

9. The Respondent filed its Memorandum of Reply in Court on 30<sup>th</sup> November 2015 in which the Respondent admitted having engaged the Claimant in the manner alleged in his Memorandum of Claim.

10. The Respondent further averred that the Claimant's wages were calculated on the basis of sales commission and the same was payable every fortnight.

11. The Respondent further stated that on 21<sup>st</sup> June 2013 there was a theft within its premises as a result of which the police were invited and investigations done and Claimant among other members of staff were arrested, recorded statements at Kamakunji Police Station and were later arraigned at Makadara Law Courts on 25<sup>th</sup> June 2013.

12. The Respondent contends that the Claimant failed to report back to work after paying the requisite cash bail and only sent a demand letter through his advocates two years later claiming unfair termination.

13. The Respondent further contended that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim being a casual employee who deserted duties. The Respondent further stated that the Claimant was paid all his dues at the time of his separation with the Respondent.

14. The Respondent therefore urged this Honourable Court to dismiss the instant Claim with costs.

15. The matter was thereafter fixed for hearing on 25<sup>th</sup> February 2019 and 20<sup>th</sup> June 2019 with the Claimant testifying on his own behalf and the Respondent calling one witness to testify on its behalf.

### **Evidence**

16. The Claimant, CW1 testified that he was employed by the Respondent herein from 6/12/2010 as a Sales Assistant. He further confirmed that his last salary was Kshs. 12,000/- and that he was in continuous service.

17. CW1 further testified that on 21/6/2013 while he was on duty at around 11 am he was arrested by a police officer from Kamukunji Police station on account of theft and was arraigned at Makadara Law Courts. He further averred that no Criminal case was ever filed in Court against him.

18. CW1 further testified that the police bail was later refunded back to him and he subsequently reported back to work on 8/7/2013 when he was informed that his services were no longer required.

19. He contended that his services were unfairly and unlawfully terminated as no notice was issued prior to his termination. He further averred that he was not given an opportunity to present his case before his termination.

20. CW1 consequently urged this Honourable Court to allow his Claim as drawn.

## **Defence Case.**

21. The Respondent called one witness **John Mwaure, RW1**, Shop Manager with the Respondent who in his evidence reiterated the averments made in the Memorandum of Reply as his evidence in chief. He further urged this Court to dismiss the Claim with costs.
22. On cross-examination, RW1 confirmed that the Claimant was employed by the Respondent herein. He further stated that he (the Claimant) worked on commission basis.
23. RW1 further confirmed that the Claimant was arrested following an incident of theft at the Respondent's shop. He further stated that the Claimant was never arraigned in Court as he absconded bail. He nonetheless confirmed that the cash bail was extended as per the cash bail receipt.
24. On further cross examination RW1 stated that the Respondent did not follow up with the criminal case and that it never took any action against the Claimant for absconding duty. RW1 also stated that the issue was never reported to the labour officer.
25. RW1 confirmed that the Claimant was paid all his dues at the time of his separation. He however stated that he had no documents to ascertain the fact that all the Claimant's dues had been settled.
26. RW1 confirmed that the Claimant was not taken through any disciplinary hearing prior to his termination.
27. The Respondent urged the Court to dismiss the instant Claim with Costs.
28. The parties thereafter filed and exchanged their written submissions to this Claim.

## **Submissions by the parties**

29. The Claimant submitted that his termination was unfair and unlawful as the Respondent failed to comply with the mandatory provisions of Sections 41, 43 and 45 of the Employment Act, 2007. To buttress this argument the Claimant cited and relied on the case of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where it was held that:-

*“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”*

30. The Claimant further submitted that fair procedure was not adhered to in his termination and hence the dismissal was unlawful and unfair. For emphasis the Claimant urged this Honourable Court to be guided by the cases of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers Vs Mombasa Sports Club, Cause No. 440 of 2013** and the Court of Appeal decision in the case of **International Planned Parenthood Federation Vs Pamela Ebot Arrey Effiom (2016) eKLR**.

31. The Claimant contended that he is entitled to the reliefs as sought in his Claim having proved his case to the required standard.
32. On Notice pay, the Claimant submitted that he is entitled to the same by dint of Section 36 of the Employment Act, 2007 and urged the Court to award him the same.
33. With regards to the prayer for untaken/unpaid leave the Claimant submitted that he is entitled to the same as he did not proceed on leave during the entire period he was under the Respondent's employment.
34. He further contended that the Respondent failed to avail any documentation or prove that he went on leave or was paid in lieu thereof. The Claimant submitted that he is therefore entitled to the same by dint

of Section 28 of the Employment Act, 2007.

35. In conclusion, the Claimant urged this Honourable Court to allow his Claim as drawn.

36. I have examined all evidence from both Parties and the submissions here. From the evidence, the Claimant avers that he was arrested at the instigation of the Respondent and released on police bail. When he went to seek for his job, he was told to await further communication from the Respondent, which never came through.

37. The Respondent on the other hand, insist that the Claimant absconded duty.

38. The Respondent in cross-examination indicated that the Claimant was never arraigned in Court. The Respondent also stated that they never took any action against him for absconding duty.

39. The Court finds that the Respondent though insisting that the Claimant absconded duty, they never took him through any disciplinary process. The position of Claimant is that he only received a text message asking him to return his uniform.

40. It is therefore my finding that the Claimant was terminated for no apparent reason and without due process as there is no reason assigned to the termination.

41. The termination is therefore unfair and unjustified. In terms of remedies, I find for the Claimant and award him as follows:-

**1. 1 month salary in lieu of notice = 12,000/=**

**2. Payment for leave not taken for the year 2013 = 12,000/=**

**3. 8 months' salary as compensation for the unfair and unjustified termination = 8 x 12,000 = 96,000/=**

**TOTAL = 120,000/=**

**4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this **16<sup>th</sup> day of January, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Ngethe holding brief Namada for Claimant – Present

Respondent – Absent