



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**CAUSE NO.70 OF 2017**

**WYCLIFF JUMBA INDIAZI.....CLAIMANT**

**VERSUS**

**MEGA PACK (K) LIMITED.....RESPONDENT**

**JUDGEMENT**

The claim is that the claimant was employed by the respondent as a machine operator from August, 2010 to November, 2016 when employment terminated without payment of terminal dues. That the respondent alleged that he had hidden bailer twine leading to summary dismissal without any investigations to ascertain this was not true.

The claim is that at the time of summary dismissal the claimant was earning ksh.12, 478 per month. There was a contract of service.

That the claimant had not taken his annual leave for 6 years and claim Ksh.52, 507;

- a. That he worked for 7 days per week without taking off day and claim Ksh.129770.27;
- b. Notice pay Ksh.12,770;
- c. Service gratuity Ksh.37, 434;
- d. Compensation;
- e. General damages for mental anguish; and
- f. Costs.

The claimant testified that he was employed under a written contract from August, 2010 as a machine operator and the contract started running from 1<sup>st</sup> April, 2014 working 7 days from 8am to 5pm each day.

The claimant also testified that On 19<sup>th</sup> November, 2016 while working in the bailing section as store keeper Mr Mureithi brought a bailer twine before the other twine bailer was finished. The claimant decided to keep the second bailer behind the machine to avoid it being stolen. The factory manager, Jattin called the claimant and asked to know the whereabouts of the second bailer but he instead sent Bernard and Babu to find the second bailer. The two found the bailer behind the machine.

The next day the human resource officer issued the claimant with a notice to show cause notice why his employment should not be terminated over the hidden twine bailer. He was then invited for a disciplinary hearing on 22<sup>nd</sup> November, 2016. He was then issued with letter of summary dismissal without payment of terminal dues.

The defence is that on 19<sup>th</sup> November, 2016 the claimant requested to be issued with a bailer twine to the machine in which he was operating yet there was another bailer twine that was still in used in the machine. The second bailer twine went missing and after a thorough search the bailer twine was found hidden away from the machine the claimant was operating. He was issued with a notice to show cause why his employment should not be terminated and then invited to a disciplinary hearing on 22<sup>nd</sup> November, 2016. Present there was a shop steward and the claimant decided to attend on 23<sup>rd</sup> November, 2016. A decision was taken to dismiss the claimant.

From 21<sup>st</sup> November, 2016 the claimant decided to be absent from work until 23<sup>rd</sup> November, 2016 when he appeared a day past the scheduled time for his disciplinary hearing. All terminal dues were paid to the claimant through his bank account at Housing Finance Bank. He accepted these terminal dues.

Eric Njenga Wagatwa testified in support of the defence that the claimant was found to have hidden the bailer twine, when called to explain his conduct he did not have satisfactory answers and was thus invited to a disciplinary hearing. The claimant had asked for a second bailer twine whereas the practice was that only one bailer twine was enough. The claimant was hence suspected of having hidden the twine bailer with intent to steal it. The claimant was invited to a disciplinary hearing on 22<sup>nd</sup> November, 2016 and failed to attend he decided to attend the next day 23<sup>rd</sup> November and he was given Judgement: Cause No.70 of 2017 a hearing but his explanations were not acceptable. His terminal dues were tabulated and deposited in his bank account. These included;

Basic pay;

Over time paid erroneously as this was not due;

Leave days not taken.

The claimant would be at work for 6 days each week with Sunday being his rest day. Work during public holiday was compensated. The respondent kept clocking records for the claimant. There was due process.

Both parties filed written submissions.

The claimant in his evidence and statement admitted that he sourced for a second twine bailer while the first had not been finished. He admitted that he hid the twine bailer behind the machine to avoid the same being stolen.

The claimant sourced for the second bailer from the store. He was on the shop floor. The claimant was not the store keeper and the practice and policy was to get a new twine bailer after the one issued got finished.

What then was the claimant afraid of by hiding the twine bailer behind the machine?

What was the purpose of having a store keeper at the shop floor?

The defence that the claimant was found hiding the twine bailer with intent to steal it is hence true and correct. The claimant was issued with a notice to show cause with regard to his conduct and he failed to show good cause. He was invited to attend disciplinary hearing on 22<sup>nd</sup> November, 2016 but he failed to attend. When he decided to attend on 23<sup>rd</sup> November, 2016 he was given a hearing but his defences were found not sufficient and hence his employment terminated by summary dismissal.

Section 44(3) and (4) of the Employment Act, 2007 read together with section 41(2) of the Act allow the employer to dismiss the employee from his employment following gross misconduct and after inviting such an employee to give his defence and there is no good cause given.

In this case, summary dismissal is hereby found justified. The claimant was taken through the due process.

Compensation and notice pay is not due.

The claimant is seeking payment of rest days allegedly not taken for the duration of employment. The respondent has work records for clocking and evidence that the claimant worked for 6 days with Sunday being his day of rest. This evidence was not challenged. Claim for rest days' pay is without justification.

Part of the respondent's list of documents is the payment statements;

In November, 2016 the claimant was paid leave balance at ksh.14,960;

December, 2013 he claimant was paid leave balance Ksh.7, 221;

November, 2016 the claimant was paid leave allowance Ksh.14, 960; and

June, 2015 the claimant was paid travelling allowance ksh.1, 900.

The claimant was paid in lieu of taking annual leave.

Employment on contract having commenced on 1<sup>st</sup> April, 2014 and there being pay in lieu of taking annual leave in the year 2016 and leave travelling allowance in June, 2015 the claims made for pay in lieu of taking annual leave is without justification.

On the claim for service gratuity, on the payment statements filed by the respondent, the claimant had statutory dues deducted and remitted. There is no separate contract or agreement attached giving gratuity as a benefit. The claim made for gratuity is not justified.

On the claim for damages over alleged mental anguish following the notice to show cause why employment should not be terminated and eventual summary dismissal but the court having found the termination of employment was justified, to claim there was mental anguish and embarrassment over the same, to claim general damages is to seek without foundation.

Accordingly, the claims made are hereby dismissed. Costs to the respondent.

**Delivered at Nakuru this 27<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....