



**REPUBLIC OF KENYA**

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

**CAUSE NO. ELRC. 2224 OF 2015**

**VICKMAN IVUTI NTHIMA .....CLAIMANT**

**VERSUS**

**PHILOMENA WANJIRU T/A. KIKI CAFÉ**

**KIKI CAFÉ LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant’ suit is contained in the amended statement of claim filed on 30.5.2018 which seeks the following reliefs jointly and severally against the Respondents:

a) A declaration that the termination of the claimant was unfair, irregular and contrary to Articles 41 and 47 of the Constitution of Kenya 2010.

b) One month’s salary in lieu of notice .....Ksh. 10600/-

c) Leave allowance .....Ksh.31,800/-

d) House allowance (15% basic pay for 3 years.....Ksh. 15,900/-

e) Service gratuity

(15 days for each completed year service) .....Ksh. 90,100/-

f) Damages for unfair dismissal

(12 months’ salary) .....Ksh.127,200/-

**SUB-TOTAL .....KSH. 275,600/-**

g) Damages for overtime (3 years),public holidays (3 years),

and accrued leave allowance .....Kshs. 384,840/-

**GRAND TOTAL .....Ksh. 660,440/-**

h) Aggravated and exemplary/punitive damages to be assessed by court.

i) Costs of suit and interests.

j) Certificate of Service

2. The facts of the case are that the claimant was employed by the Respondents from 1998 as a cleaner and rose the ranks to become cashier. On 1.5.2015, he reported to work at 5 p.m. for the night shift but he was dismissed on suspicion that he had stolen building materials belonging to the employer. The claimant contends that the alleged theft was false because it was not stated to him until he reported to the labour officer. He contended that the termination was unfairly done without according him any hearing. He therefore prays for

compensation damages.

3. The respondents have denied the alleged unfair dismissal and averred that there was reasonable suspicion that the claimant committed the offence of theft of the company's construction materials under his care within the respondent's café and occasioned substantial loss. They therefore prayed for the suit to be dismissed with costs.

#### **Evidence by the claimant**

4. The Claimant testified as CW1 and basically reiterated the averments in his statements of claim and his written witness statement. In brief he testified that he was employed by the 1st Respondent in 1998 verbally and worked until 1.5.2015 when he was dismissed without any prior notice, for no reasons, and without being heard. He further testified that he never went for leave or received house allowance for the entire period he served. He further contended that he was not registered for NSSF and nothing was contributed until 2014.

5. The claimant further testified that on 6.5.2015 he served a demand letter through his lawyer's but it was ignored by the respondent forcing him to report to the labour office. The labour officer also served as demand letter on the respondent and for the first time, the respondent alleged that the claimant was dismissed for theft and the case was reported to the police.

6. In cross-examination the claimant contended that he started off on 10.7.1998 as a casual employee but in 2000 he became permanent. He admitted that the employer filed NSSF statement showing that his NSSF contribution started in 2013. He further admitted that he never sought for any leave but quickly explained that the employer did not prepare any leave schedule. He however admitted that he was being given 7 days leave in December during Christmas holiday. However he denied that his salary was consolidated.

7. He maintained that he was dismissed for no reason but later he was called to record statement with the police at Kamukunji. However when he went to the police station he was told that he could not go there alone. He contended that his duties did not include that of security guard. He denied knowledge of the property that was alleged to have been stolen.

#### **Respondent's case.**

8. The 1st respondent testified as RW1 to oppose the claimant's suit. She confirmed that 2nd respondent and herself are one and the same and that she is the director of the 2nd respondent. She admitted that the claimant was her employee in the company and she used to give him annual leave at the rate of 2 days per month and at the end of the year she used to give him 7 days.

9. RW1 contended that material for renovation were kept in the hotel but they were stolen and Mr. Mbatha reported to the police. She further contended that after the report was made to the police, the claimant and his colleagues deserted work and lodged complaint with the labour officer, who called them for a hearing and RW1 went with a police officer to arrest the claimant. However, the claimant did not show up.

10. In cross-examination, RW1 admitted that she discussed the claimant after property was stolen. She contended that the theft occurred in the premises where the claimant was working. However, she admitted that the claimant was not a security guard.

11. RW1 further admitted that she employed the claimant in 1998 before registering the 2nd respondent company. She however denied that the claimant worked as casual continuously from 1998.

#### **Issues for determination**

12. There is no dispute that the claimant was employed by the respondent between 10.7.1998 and 1.5.2015 when he was dismissed by the 1st respondent. The issues for determination are:

- a) Whether the dismissal was grounded on a valid reason.
- b) Whether fair procedure was followed before the dismissal.
- c) Whether the claimant is entitled to the reliefs sought.

#### **Reason for dismissal**

13. RW1 stated that she dismissed the claimant after building materials were stolen from the premises where the claimant was working. The materials included blockboards and iron pipes of considerable value. The claimant denied the alleged offence and contended that he was not aware of the stolen materials and further that he was not a security guard. Under section 43(1) and 45 (2) of the Employment Act, the employer has the burden of proving that the reason for dismissing the employee was valid and fair, and related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirement.

14. In this case the reasons cited for dismissal is theft of property from the premises where the claimant was working. I, however find that the employer has not proved that indeed she or any other officer of the company kept construction material in the hotel where the claimant was working and placed them under the claimant's care and custody. The respondents have also not proved that the claimant was seen stealing the property. Consequently, without the evidence that indeed the property was kept in the hotel and that it was stolen while under the claimant's custody, the court returns that the respondents have no discharged their burden of proving a valid and fair reason for dismissing the claimant.

**Procedure followed**

15. Under section 41 of the Employment Act, before the employer dismisses his employee for misconduct like in this case, the employer must explain the reason to the employee in a language he understands and in the presence of another employee or shopfloor union official of the employee’s choice, and thereafter accord them a chance to air their views which must be considered before the termination is decided.

16. In this case claimant contends that he was not accorded any fair hearing as set out under section 41 of the Act. RW1 did not adduce any evidence to prove that she complied with section 41 of the Act by giving the claimant a hearing in the presence of another employee or union official before the dismissal. All what Rw1 alleged was that she dismissed the claimant and told him to go to the police to record statement.

**Reliefs**

17. In view of the finding herein above that the respondent has failed to prove that she dismissed the claimant for a valid and fair reason, and that a fair procedure was followed, I make a declaration that the termination of the claimant service herein was unfair and irregular. 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 related to the employee’s conduct, capacity and incompatibility or based on the employer’s operational requirements and that a fair procedure was followed.

18. Flowing from the finding, I award the claimant one month salary in lieu of notice, plus 12 months salary as compensation for the unfair dismissal. In awarding the said compensation, I have considered the claimants long service of over 17 years and also the fact that he did not contribute to the dismissal through misconduct.

19. The claim for accrued leave is dismissed save for the last 12 months of his service because under **Regulation 9(1)(a) of the Regulation of Wages and Conditions of Employment (Hotel and Catering Trade) Order**, leave cannot be accumulated except on mutual agreement between the employer and the employee. I, therefore, award him 24 leave days only.

20. The claim for house allowance must fail because it lacks particulars of how it was calculated.

21. The claim for service gratuity is allowed for the period before the respondent started remitting NSSF contributions for the claimant in 2013. The period granted is from July 1998 to December 2012 being 14 years at the rate of 15 days pay per year of service as provided under Regulation (19) (ii) of the said Regulations.

22. The claim for overtime and public holidays is dismissed for lack of particulars and evidence. Likewise, the claim for aggravated and exemplary/punitive damages is declined for lack of legal basis.

23. The prayers for certificate of service is however granted.

**Conclusion and Disposition**

24. I have found that the dismissal of the claimant was unfair and proceed to enter judgment for him against the respondents jointly and severally as follows:

- a) Notice .....Kshs. 10,600/-
  - b) Compensation .....Kshs. 127,200/-
  - c) Leave .....Kshs.9,784.61/-
  - d) Gratuity .....Kshs.85,615.38/-
- TOTAL ..... Kshs. 233,899.99/-**

The said amount is subject to statutory deductions. I award costs and interest to the claimant on court rates from the date hereof.

**Dated, signed and delivered in open court at Nairobi this 14th day of February, 2020.**

**ONESMUS N.MAKAU**

**JUDGE**