



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1441 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 3rd February, 2020)

FRANCIS KIMWELE MUTINDA.....CLAIMANT

VERSUS

GALMALT SUPERMARKET.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed an Amended Memorandum of Claim on 15th October, 2015, in which he seeks compensation for wrongful termination of his employment by the Respondent herein as well as failure by the Respondent to pay his terminal dues owed to him.
2. The Claimant states that he was employed by the Respondent on or about 19th May, 2010 in the position of a baker earning a monthly salary of Kenya Shillings Fourteen Thousand Five Hundred and Fifty only (Kshs. 14,550). He further averred that he was not issued with any appointment letter to that effect.
3. The Claimant averred that he performed his duties diligently and to the Respondent's satisfaction until 21st November, 2014 when his services were unlawfully terminated by the Respondent. He further averred that at the time of his separation the Respondent failed to pay his terminal dues totalling to Kshs. 864,530/- only.
4. Aggrieved by the decision of the Respondent to terminate his services the Claimant filed this Claim seeking the following reliefs:-

a. Principal amount of Kshs. 864,530/- comprising of the following:-

i. 1 month's salary in lieu of notice Kshs. 14,550

ii. Overtime Kshs. 785,700

iii. Unlawful termination

benefits (12,000 x 6) Kshs. 72,000

iv. NSSF deductions (2013 -2014)

unpaid 12 months Kshs. 4,800

v. NHIF deductions (2014)

4 months Kshs. 1,280

vi. Holidays Kshs. 14,550

vii. Leave Allowance Kshs. 43,650

Employment Act, 2007.

23. The Claimant further submitted that the assertion that he absconded and/or dissented duties or reported for duty while drunk were untrue and that in absence of any evidence availed by the Respondent on the same. He contended that the Respondent had no valid reason to terminate his employment rendering the same as unfair. To buttress this argument the Claimant relied on the case of **Nicholas Muasya Kyula Vs Farmchem Limited (2012) eKLR** where the Court held:-

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

24. The Claimant further submitted that having established that his termination was procedurally unfair he is entitled to the reliefs sought in his Amended Memorandum of Claim by dint of Sections 35 and 49 of the Employment Act, 2007.

25. In conclusion, the Claimant urged this Honourable Court to allow his Claim as prayed.

Respondent’s Submissions

26. The Respondent on the other hand submitted that the Claimant is not entitled to the reliefs sought in his Amended Memorandum of Claim having absconded his duties. To fortify this argument the Respondent relied on the case of **Joseph Njoroge Kiama Vs Summer Limited (2014) eKLR** where the Court held that:-

“If the Court came into conclusion that the Claimant absconded duty, then his Claim would not lie, if on the other hand, the Court comes to the conclusion that he was unlawfully terminated then the Court can proceed and assess damages”.

27. Further, in **SACWU Vs DYASI (2001) 7 BLR 731 (LAC) (unreported)** the Court held:-

“Desertion amounts to repudiation of the Contract of employment which the employer is entitled to accept or reject. The acceptance of the repudiation amounts to dismissal if the employee fails to render service.”

28. The Respondent further submitted that absconding duties is one of the grounds that warrant summary dismissal as provided under Section 44 (4) (a) of the Employment, 2007. To fortify this argument the Respondent cited the authority of **Joseph Njoroge Kiama Vs Summer Limited (2014) eKLR**.

29. The Respondent further submitted that the Claimant was paid all his dues prior to his act of absconding duties and therefore he (the Claimant) has no Claim as against the Respondent. The Respondent further contended that it is entitled to its counterclaim and it urged the Court to allow the same as prayed.

30. In conclusion, the Respondent urged this Honourable Court to dismiss the Claim filed herein and allow its counterclaim as prayed.

31. I have examined all the evidence and submissions from both Parties. The Respondent have averred that they terminated the Claimant verbally due to being a habitual absentee and a drunkard. The Claimant denied this contention insisting that he was never absent from work and that the Respondent had a clocking system which would show his attendance.

32. The Respondent did not produce the muster roll to show the Claimant’s pattern of attendance at work. There is no evidence that the Claimant was subjected to any disciplinary hearing either before the termination.

33. Section 45(2) of Employment Act 2007 which states as follows:-

2. “A termination of employment by an employer is unfair if the employer fails to prove:

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee’s conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure”.

34. The Respondent have not proved that they had any valid reason to warrant dismissing the Claimant and neither did they subject him to a disciplinary hearing as envisaged under Section 41 of Employment Act 2007.

35. I therefore find the dismissal of the Claimant unfair and unjustified and I declare it so.

36. In terms of remedies, I find for the Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 14,550/=

2. NSSF deductions unpaid = 4,800/=

3. NHIF deductions for 4 months in 2014 = 1,280/=

4. 10 months' salary as compensation for unlawful termination = 10 x 14,550 = 145,550/=

TOTAL = 166,130/=

Less statutory deductions

5. 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 3rd day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Serunjochi holding brief Kalwa for Claimant

Miss Katana holding brief Gule for Respondent