



**REPUBLIC OF KENYA**

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

**AT NYERI**

**CAUSE NO. 383 OF 2017**

**KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**KIAMBAA DIARY FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent on behalf of the Grievant Peter Njuguna. It was averred that the Grievant was employed on 1<sup>st</sup> October 2009 as a general labourer earning Kshs. 7,000/- a month with no house allowance. The Claimant averred that the Grievant was based at Kiambaa Diary and his main duty then was cleaning cans. The Claimant averred that the Grievant was later promoted to the position of milk collector. It was averred that on 5<sup>th</sup> July 2016 the Grievant reported for work as usual and as they were about to leave the premises with the driver he was asked to get out of the lorry. The Claimant averred that the Grievant was accused of adulterating the milk by the quality control manager and was dismissed. The Claimant averred that the Grievant pleaded with the Managing Director Mr. Njenga to at least test the milk to prove if there was milk but he was sent away. The Claimant averred that the Grievant was victimized as the Claimant and Respondent had at the time an ongoing dispute on recognition. The Claimant averred that there was no evidence there was milk in the water and that the dismissal was thus unlawful and unfair contrary to Sections 41, 43 and 45 of the Employment Act. The Claimant averred the Grievant was not given an opportunity to defend himself against the accusations levelled against him. The Claimant averred that the Respondent declined responding to letters sent to it by the Claimant prompting the Claimant to report the dispute to the Minister as per Section 62 of the Labour Relations Act 2007. The Cabinet Secretary appointed a conciliator and upon parties meeting on 28<sup>th</sup> February 2017 there was no agreement and the conciliator issued a conciliation report in April 2017 after another meeting where parties did not agree. The Claimant rejected the report as it contended the Grievant had worked for over 5 years yet the period in the calculations was 1 year. The Claimant averred that the Respondent forwarded a cheque of Kshs. 34,714/- which the Grievant rejected as the conciliator had recommended for even more than was paid. The Claimant thus sought the reinstatement of the Grievant unconditionally. Damages for loss of employment equivalent to his gross salary for the period he has been out of employment, six months wages as compensation for wrongful accusation and interest at 20% on the sums claimed as damages. In the alternative the Claimant sought one month's notice – Kshs. 22,027.10, public holiday for 6 years – Kshs. 42,148.80, annual leave for 6 years – Kshs. 80,446.80, unpaid salary for 5 days in July 2016 – Kshs. 3,671.20, service gratuity for 3 years – 57,462/- , overtime for 3 hours per day – Kshs. 775,656/-, house allowance for 6 years Kshs. 206,863.20, costs of the suit and any other relief the court may deem fit to grant in the interest of justice.

2. The Respondent in its defence averred that the Grievant had a running contract with the Respondent as a lorry loader. The Respondent averred that on 8<sup>th</sup> July 2016 the quality controller supervisor on a spot check found the Grievant with adulterated milk and upon seeking an explanation from the Grievant he disappeared and refused to return to work. The Respondent averred that since the Grievant's contract was about to expire and taking into account the failure to give an explanation on the adulteration or absconding by the Grievant it proceeded to terminate the contract under the express provisions thereof. The Respondent averred that it was a stranger to the averments on the trade dispute.

3. The Grievant and the Respondent's HR officer Irene Wamuyu Mwangi testified. The Grievant testified that he was employed on 1<sup>st</sup> October 2009 and was not given any letter of employment. He stated that he was a cleaner and was promoted later and that he earned Kshs. 7,000/- at the time he was terminated. He testified that he was accused of carrying water in the vehicle. He stated that he had been promoted to salesman and would collect and sell milk. He stated that on 5<sup>th</sup> July 2016 he was accused of adulterating milk and that he was with a driver named Servio who was not dismissed. He testified that he was verbally terminated and was told to leave by Mr. Kinyanjui. He stated that he was not given the letter of termination. He stated that he was not paid double for public holidays and that he worked overtime. He testified that the Respondent was ordered to pay Kshs. 163,647/- by the Labour office Kiambu and the Respondent did not pay. He thus sought the leave dues, holiday and service as well as overtime and notice. In cross-examination he stated that he was not the one who had signed the contracts exhibited by the Respondent in its bundle of documents. He denied being employed in July 2015. He stated that he did not have any water for adulterating milk. In re-exam he stated that he was employed in 2009 by Njenga a manager and that he worked with Salim a manager carrying milk and that his last salary was Kshs. 12,000/-.

4. The Respondent's witness testified that she knew the Grievant who was employed on 1<sup>st</sup> July 2015. She stated that he was a loader and a casual worker with 1 year contract. She stated that his duty was to pick milk and if it was adulterated and bad the milk would be rejected. She testified that on 8<sup>th</sup> July 2016 the Grievant was found during a spot check with adulterated milk. She stated that he was found with water and he could not explain why the milk had water and why he had carried a can of water. She said that he did not report the next day or the day after and the society per its policy rendered a summary dismissal. She stated that the Grievant left and never came back perhaps because he knew adulteration of milk was a criminal offence and there was possibility the Police would be called. She testified that the Grievant was paid for the 8 days worked and nothing more. She stated that there was no Collective Bargaining Agreement with the union and that in 2016 the Grievant had disowned membership to the union. She said that there was a meeting at the Labour Office and after the meeting there was money to be paid to the Grievant which the Respondent remitted but the money was returned as the Grievant did not collect it. She stated there were 2 shifts 5.00am to 9.00am and then from 3.00pm to 5.00pm. In cross-examination she testified that she joined the Respondent in 2019 and that she knew the Grievant through the records. She said the records were not hearsay and that there were records on the Grievant

in the files. She stated that the Grievant was to grade the milk and ensure the quality is good. She stated that he was not a salesman and that he did the recording. She testified that immediately after the termination the Grievant was to appeal. She stated that the letter was issued upon termination on 9<sup>th</sup> July and the Grievant was to appeal in 7 days. She stated the Grievant was to be paid some Kshs. 34,000/- after a verbal agreement with the union requesting and the management. She confirmed that the Respondent did not pay the sums indicated by the Labour Office as it was based on the wrong grading. She testified in re-exam that the Grievant did not appeal or follow up after dismissal. She stated the Respondent queried his representation by the Union. She stated the Grievant disappeared for one week.

5. The parties were to file submissions and the Claimant's submissions were that the Grievant was accused of adulterating milk on 5<sup>th</sup> July 2016 and his services terminated without notice. The Claimant submitted that the Grievant had worked for 6 years without any reprimand or caution and the dismissal was unfair. The Claimant submitted that the Grievant went to the manager to seek redress but he was not permitted to make representations. The Claimant submitted that the Grievant was paid Kshs. 12,000/- which was below the gazette minimum of Kshs. 19,154 as basic plus house allowance of Kshs. 22,027.10 for a salesman. The Claimant submitted that the Grievant was not given the opportunity to defend himself in terms of Section 41 of the Employment Act. The Claimant submitted that the Respondent manufactured documents which it did not have at the conciliation process such as the termination letter and the contracts. The Claimant submitted that the Respondent's witness who joined the company in 2019 misled the court and lied since she was not there at the time of the action and that her testimony should be struck out from the court records. The Claimant submitted that the Grievant was entitled to be reinstated and damages for the loss of employment equivalent to the period he has been out of employment. In the alternative the Claimant sought payment of terminal dues including notice pay, gratuity for 6 years, public holidays, overtime, house allowance, annual leave and compensation all amounting to Kshs. 806,230.30.

6. The Respondent submitted that the Grievant had a one year temporary contract to work as a lorry loader at a salary of Kshs. 12,000/-. The Respondent submitted that at no time was the Grievant promoted to the position of salesman. The Respondent submitted that the Grievant was found red-handed with adulterated milk and the Respondent dismissed the Grievant as he was dishonest and his conduct in bad faith. The Respondent submitted that the termination of the Grievant was lawful as the Grievant's conduct fell within the provisions of Section 41(2) and 44 of the Employment Act. It submitted that it had valid grounds for the termination in terms of Section 43(1) of the Act. Reliance was placed on the case of **Kenya Plantation & Agricultural Workers Union v Sotik Highlands Tea Estate Limited [2016] eKLR** on the valid and fair reasons for termination. The Respondent urged the dismissal of the Claimant's claim.

7. The Grievant was represented by a union namely the Kenya Union of Commercial Food & Allied Workers, which union did not have any recognition agreement or any CBA past or present with the Respondent. As such, the suit was brought by an intermeddler since the matter of recognition was unresolved at the time of the filing of the suit. A trade union only gets the authority to represent a party on the basis of agreements reached with the employer permitting the representation of the employees by a union in terms of the Labour Relations Act. Since the union was the improper party, the suit was not brought by a competent person. In regard to the facts of the case, the Grievant was dishonest as he lied about his signature on the contracts he had signed with the Respondent. His signature on the papers filed by the Claimant tallied with that in the contract and he was therefore disingenuous in his attempt to deny his own signature. As the Respondent adduced evidence to show that the dismissal of the claimant was founded on a valid and fair reason. The Respondent's case outweighs that of the Claimant on the veracity of the evidence adduced as the Grievant was not truthful even insisting that he was dismissed verbally on 5<sup>th</sup> July 2016 whereas the incident that led to his termination was on 8<sup>th</sup> July 2016 per the records availed at the trial. The evidence and case of the Respondent overwhelms the Claimant's by far and I find no reason to grant the Grievant the reliefs sought in the claim. The suit is dismissed and an appropriate order for costs would be against the Claimant Union for mounting a false claim.

8. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16<sup>th</sup> March 2020 and the Kenya Gazette Notice 2357 of 20<sup>th</sup> March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days. On lapse of the 14 days if any execution is to issue it must be sanctioned by the Court.

It is so ordered.

**Dated and delivered at Nyeri this 30<sup>th</sup> day of March 2020**

**Nzioki wa Makau**

**JUDGE**