



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 46 OF 2017

BETWEEN

JAMES EPUSY..... CLAIMANT

VERSUS

PETROL PLUS KENYA LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe.

Nyakoni Ratemo & Company Advocates for the Claimant

Oloo & Chatur, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 16th August 2017. He states, he was employed by the Respondent as Head Cook, on 1st February 2013, until 5th October 2016 when he was summarily dismissed by the Respondent. He was earning a monthly salary of Kshs. 26,120, as of the date of termination.

2. He asserts he was not heard before dismissal. He was not notified. He was not paid terminal dues. The reasons given in justifying dismissal were unfounded. He asks the Court to find termination was unfair, and grant Judgment in his favour, in the following terms:-

- a. 1 month salary in lieu of notice at Kshs. 28,428.
- b. Leave of 3 years at Kshs. 68,796.
- c. Public holidays worked at Kshs. 32,760.
- d. 12 months' salary in compensation for unfair termination at Kshs. 341,136

Less amount paid...Kshs. 30,767.

Total claimed... Kshs. 440,353.

- e. Declaration that termination was unfair.
- f. Certificate of Service to issue.
- g. Costs.

h. Interest.

i. Any other relief.

3. The Respondent filed its Statement of Response on 17th March 2017. Its position is that the Claimant was an Employee of the Respondent, as pleaded in the Claim. He was given a fair hearing before dismissal. He was dismissed for insubordination. He is not entitled to notice, having been summarily dismissed for gross misconduct. He utilized his annual leave for all the years served. The Respondent always closed for public holidays. If he was engaged on public holidays, he was promptly compensated. There is no merit in the prayer for compensation, the Claimant having been summarily dismissed on valid ground.

4. The Claimant gave evidence, and closed his case, on 13th February 2018. The Respondent did so through its Human Resource Manager, Carolyne Mutheu Mulili, on 13th November 2019.

5. The Claimant adopted his Witness Statement and Documents on record, as his evidence. He restated his employment history with the Respondent, and the terms and conditions of service. It was his role as Head Cook to arrange timetable for the Kitchen.

6. On 7th September 2016 he arranged the timetable, pasted it on the notice board and left. He shared it with the Manager before leaving. On return, on 8th September 2016, he found alterations made by the Manager, Alex. The one prepared by the Claimant had 6 Employees on shift for 1 week. Alex made it 2 Employees for the week.

7. The Claimant did not insult Alex. He just raised his voice a little. Most times, the Claimant's voice is loud. He was called to show cause, why disciplinary action should not be taken against him. He replied to the letter explaining the engagement he had with Alex on 8th September 2016. He continued working. On 5th October 2016, he was called to office and advised that his letter of termination had arrived. He did not receive the letter calling him to hearing, dated 27th September 2016. He was paid a little terminal benefits. He did not receive Certificate of Service. He acknowledged the leave application forms, exhibited by the Respondent. He stated that in most cases, leave was not approved. He worked on public holidays without holiday pay. He had previously been warned in 2014 after engaging in physical altercation with a colleague. He did not have any other warnings.

8. Cross-examined, he conceded that his letter of employment provided for summary dismissal. Alex was senior to the Claimant. The Claimant made a timetable, which Alex adjusted. Alex had authority to adjust. The Claimant quarreled with Alex. He did not shove or insult Alex. There were customers at the premises. The Claimant apologized. He did not see the letter inviting him to disciplinary hearing. Reason for termination was given in the letter of summary dismissal. It was alleged that the Claimant lacked discipline. Earlier, he had fought colleagues. He signed leave forms. He executed discharge voucher in December 2016. He discharged the Respondent and received settlement cheque. Redirected, the Claimant told the Court that he was compelled by the Respondent to sign discharge, in order to have the cheque.

9. Carolyne confirmed that the Claimant was employed and dismissed by the Respondent, on dates specified in the Claim. Cross-examined she stated that the Respondent runs small shops and restaurants. The Claimant served as Head Cook, in Respondent's Restaurant. Carolyne received e-mail communication in September 2016, saying the Claimant had altered timetable without consulting Management. The incident took place on 4th September 2016. Other witnesses stated it was on 8th September 2016. The Respondent investigated. There are no minutes of the disciplinary proceedings exhibited. Invitation to the hearing was not acknowledged by the Claimant. He had acknowledged receipt of notice to show cause issued earlier, and replied. He was not averse to replying to letters. He received and signed dismissal letter. He had a warning letter in May 2014. There was no other warning to the date of dismissal. Redirected, Carolyne confirmed that the Claimant took annual leave.

The Court Finds:-

10. The Claimant was employed by the Respondent as the Head Cook, effective 1st March 2013. His letter of employment issued after appointment, on 25th February 2014. He signed the letter on 5th March 2014.

11. The Claimant regulated the kitchen staff on their work shifts. He prepared the kitchen timetable. He was however under the supervision of the Manager.

12. It happened that there was a new Manager named Alex, who sometime in early September 2016 [the Witnesses were not clear on the exact date] clashed with the Claimant over the timetable. Some Employees failed to report to work, owing to lack of coherence in the timetable prepared by the Claimant and amended by Alex. The Claimant maintained his schedule should override the amendments made by his supervisor. There was a quarrel between the Claimant and Alex, in front of customers and other staff.

13. The Claimant admits there was a quarrel, explaining that he did not shout at, shove or insult Alex. He stated that his voice is naturally loud.

14. The Court formed the view that the Claimant was involved in act of insubordination. He seems to have been a troublesome Employee, with a history of fighting at the workplace. He did not respect the new Manager.

15. In *Dede Esi Arnie Amanor Wilks v Action Aid International [2014] e-KLR*, it was held that, Employers generally have the right to weed out Employees who are insubordinate and incompatible, who exhibit verbal and non-verbal forms of insubordination, and who fail to fit in the corporate culture of the Employer. The Claimant herein defied his Manager, upset the timetable as amended by the Manager, and confused Employees on their work schedules. He quarreled the Manager in front of staff and customers. It was not a one-off event, but an

event preceded by other acts of combative behavior at the workplace, on the part of the Claimant. Employers are entitled to have peaceful and harmonious work environment, and to rid themselves of eccentric Employees.

16. There was valid ground, justifying termination, under Section 43 and 45 of the Employment Act.

17. The Claimant was issued letter to show cause. He replied largely conceding that he had acted against the instructions of the Manager. He apologized and committed himself to accept any penalty imposed by the Respondent. The Respondent scheduled a disciplinary hearing. There is a letter inviting the Claimant, dated 27th September 2016. The Claimant states he did not receive the letter, but he was still at work, not on suspension, and the address used was the workplace address. Weighing his demeanor and credibility against that of Carolyne, the Court would uphold the evidence of the Respondent on service of the disciplinary notice.

18. He did not complain immediately after 27th December 2016, that he was not heard. He instead, availed himself to the offices of the Respondent, where he signed a discharge voucher on 25th October 2016. He confirmed that he did not have any further claim against the Respondent whatsoever, either in the past, present or in future. He received a sum of Kshs. 26,120, described as full and final. There is not the slightest evidence that he was compelled by anyone or anything, to sign the discharge voucher. He acted freely, and with the full understanding of the wording of the discharge.

19. There are annual leave application forms filled by the Claimant. He took leave in accordance with the applications. He has not explained why he seeks leave over the entire period of 3 years worked, in light of the leave application forms. The prayer is rejected. Details of public holidays worked, were not supplied to the Court by the Claimant. He was in charge of the timetable, and ought to have accessed timetables showing him in active duty, on given public holiday. The prayer is declined.

20. The Court is satisfied that the Claimant was summarily dismissed on valid ground. He conceded disregarding his Manager's instructions. He was involved in acts of gross misconduct. He was incompatible, failing to fit the corporate culture in a hospitality industry. He had a habit of fighting colleagues.

IT IS ORDERED:-

a. The Claim is declined.

b. No order on the costs.

Dated and delivered at Mombasa this 13th day of March 2020.

James Rika

Judge