



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 353 OF 2017

EDISON TULIA KISENGE.....CLAIMANT

VS

KIRINDO TEA TRADERS LTD.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 28th April 2017 and filed in court on 4th May 2017, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Response on 5th June 2017.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Director, Ruth Murugi.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Cashier from 2nd April 2005 until 24th August 2016 when his employment was terminated. At the time of termination, the Claimant earned a monthly salary of Kshs. 14,000.
4. The Claimant submits that the termination of his employment was without justifiable cause and in violation of due procedure. He therefore claims the following:

- a. One month's salary in lieu of notice.....Kshs. 14,000
- b. Unpaid benefits.....96,923
- c. Leave pay for 12 years.....189,000
- d. Unpaid salary for August 2016.....14,000
- e. Holidays.....90,000
- f. Certificate of service
- g. Costs plus interest

The Respondent's Case

5. In its Response dated 12th May 2017 and filed in court on 5th June 2017, the Respondent states that having been incorporated in the year 2010, the Claimant could not have been its employee since 2005.
6. The Respondent denies terminating the Claimant's employment and states that the Claimant deserted duty on being caught on Computer Circuit Television (CCTV) stealing merchandise.

7. The Respondent also accuses the Claimant of sporadic attendance to work as a result of his drinking habit. In this regard, the Respondent states that the last time the Claimant attended work was in early June 2016 and that he deserted duty in early August 2016.

8. The Respondent submits that the Claimant deserted duty after being shown a CCTV footage showing him stealing the Respondent's merchandise.

9. The Respondent further submits that it was entitled to summarily dismiss the Claimant as a result of his actions.

Findings and Determination

10. There are three (3) issues for determination in this case:

- a. The effective date of the Claimant's employment with the Respondent;
- b. Whether the Claimant has proved a case of unlawful termination of employment;
- c. Whether the Claimant is entitled to the remedies sought.

Effective Date of Termination

11. The Claimant claims to have been employed by the Respondent on 2nd April 2005. The Respondent states that it was incorporated on 25th November 2010 and could not therefore have employed the Claimant before that date.

12. The Respondent's Director, Ruth Murugi testified that the Claimant was engaged in December 2010. Murugi's testimony is confirmed by Certificate of Incorporation No. CPR/2010/36406 evidencing that the Respondent was indeed incorporated on 25th November 2010.

13. The Claimant did not adduce any evidence to contradict the documentary evidence presented by the Respondent. The Court therefore adopts the Respondent's evidence on the effective date of the Claimant's employment, being December 2010.

Unlawful Termination?

14. The Claimant told the Court that on 17th August 2016, the Respondent's Director, Francis Njau accused him of theft. The Claimant stated that Njau showed him a CCTV footage showing the Claimant putting his hands in his pocket. On 24th August 2016 Njau told the Claimant to go home.

15. The Claimant denied having stolen from the Respondent. He further denied running away from work. The Claimant testified that he was not given an opportunity to explain himself.

16. Francis Njau did not appear in court to testify. His wife and co-director, Ruth Murugi testified that the Claimant was seen on CCTV selling tea and ginger without issuing a receipt. Murugi further testified that on 17th August 2016, the Claimant took and pocketed money from the cash drawer. She added that upon being confronted with the CCTV footage, the Claimant did not show up for work.

17. The Respondent accuses the Claimant of theft and subsequent desertion. Both charges fall within the category of gross misconduct. The Claimant was therefore entitled to be heard as provided under Section 41 of the Employment Act.

18. From the evidence on record, the Claimant was not subjected to any disciplinary procedure. The Respondent's witness could not even tell the amount of money lost through the Claimant's malfeasance. The allegations made against the Claimant were consequently unproved and the ensuing termination of his employment was substantively and procedurally unfair. He is therefore entitled to compensation.

Remedies

19. In light of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service from December 2010 until August 2016. I have also taken into account the Respondent's unlawful conduct in bringing the Claimant's employment to an end.

20. I further award the Claimant one (1) month's salary in lieu of notice as well as service pay for the years worked.

21. The Respondent's Director, Ruth Murugi admitted that the Claimant did not take annual leave and was not paid his salary for August 2016. These claims therefore succeed and are allowed.

22. The claim for holidays was not proved and is dismissed.

23. Finally, I enter judgment in favour of the Claimant as follows:

- a. 6 months' salary in compensation.....Kshs. 84,000

b. 1 month's salary in lieu of notice.....	14,000
c. Service pay for 5 years (14,000/30x15x5).....	35,000
d. Leave pay for 5 years (14,000/30x21x5).....	49,000
e. Prorata leave for 2016 (14,000/30x1.75x8).....	6,533
f. Salary for August 2016 (14,000/30x24).....	<u>11,200</u>
Total.....	199,733

24. This amount will attract interest at court rates from the date of judgment until payment in full.

25. The Claimant is also entitled to a certificate of service plus costs of the case.

26. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY MARCH 2020

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JUDGE

Appearance:

Mr. Wachenje for the Claimant

Mr. Gichana for the Respondent