



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.502 OF 2016**

**BONFACE SIMIYU MAKOE.....CLAIMANT**

**VERSUS**

**KONGONI RIVER FARM (STAR DIVISION).....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent as a general worker at a monthly wage of ksh.7,378. On 27<sup>th</sup> July, 2016 employment was terminated and the claimant is seeking for payment of terminal dues on the grounds that there was no notice issued prior to termination of employment and this resulted in unfairness.

The claims made are for the payment of the following dues;

- a) Unpaid salaries for 45 days Ksh.13,243.95;
- b) Compensation for unfair dismissal;
- c) Gratuity pay for 6 years ksh.32,463;
- d) Unpaid salary for work in July, 2016 Ksh.8,829.30;
- e) Unpaid leave ksh.24,000;
- f) Unpaid overtime ksh.20,000;
- g) Off days not paid ksh.8,829;
- h) House allowances for 45 days Ksh.3,000; and
- i) Costs.

The claimant testified that he was employed by the respondent in the year 2010 to 2016 when his employment was terminated without notice or being given any reasons.

The claimant also testified that the respondent accused him of stealing 2 troughs vide letter and notice dated 18<sup>th</sup> July, 2016 and was required to show cause why his employment should not be terminated. Such troughs would be issued by the supervisor and the allegations that he went to the stores and stole them were not true.

The claimant also testified that he was upon the notice to show cause he was invited to attend a disciplinary hearing and was allowed to attend with Bradley his colleague and the allegations made that he stole were not true despite the minutes indicating that he admitted to the same. He as paid his wages for July, 2016 and dismissed. It was an underpayment. In the collective agreement an employee on suspension was allowed to earn half wage. At the disciplinary hearing there was a union representative and also Bradley confirmed the proceedings recorded were true.

The defence is that the claimant was found to have stolen troughs and was invited to give his defence but had no satisfactory responses. In a

notice to show cause dated 18<sup>th</sup> July, 2016 the allegations made were set out and the claimant replied in writing. There was a disciplinary hearing on 23<sup>rd</sup> July, 2016 and where the claimant admitted that he did not follow the correct procedures recommended by the respondent in removal of troughs from the pack house. The claimant admitted to taking two troughs but was not remorseful for his misconduct. this led to termination of employment on 27<sup>th</sup> July, 2016.

The claims made have no foundation and the respondent followed due process and there was a good reason to terminate employment. The claim should be dismissed with costs.

Evelyn Otieno testified that she is the human resource assistant with the respondent and the claimant was employed as a general worker when he committed gross misconduct by stealing two troughs of 200 metres each which he hid in a soak pit and upon issuance of the show cause notice he admitted to his misconduct. the claimant was invited to a disciplinary hearing and present was a union representative and the claimant had another employee of his choice and shop steward. The claimant pleaded to have his employment terminated instead of a summary dismissal so as to be paid his terminal dues and gratuity by opting to resign but his gross misconduct was a matter subject to summary dismissal.

Ms Otieno also testified that by letter and notices dated 27<sup>th</sup> July, 2016 the respondent dismissed the claimant from his employment and gave the reasons leading to the same.

At the close of the hearing, both parties filed written submissions.

On the evidence before court, it is apparent that the claimant was notified of his misconduct and which related to theft of two troughs of 200 metres each. He was issued with notice to show cause to which he replied and on 23<sup>rd</sup> July, 2016 he was invited to disciplinary hearing where he attended with a representative of his choice and also present was a union representative and shop steward.

The disciplinary hearing minutes are recorded verbatim.

Upon being questioned why he took the troughs from the pack house the claimant admitted that nobody had sent him to do so and because they were accessible, he did not use the old pieces as was the practice.

During the hearing the claimant was urged by his representative Bradley to tell the truth. The meeting was adjourned for his to consult with his representative and upon return, the claimant pleaded to be allowed to resign from his employment so as to be paid his service but this was declined on the basis that the disciplinary hearing was underway.

In conclusion, the disciplinary hearing made a finding that the claimant had not been authorized to remove the troughs from the pack house. This arose through an organised scheme but he refused to mention those in his cohorts with him. such was theft of company property.

The claimant was therefore notified of his misconduct, he was allowed a hearing and wherefrom his responses were not found satisfactory. He was notified of the outcome of the hearing and the summary dismissal.

The court finds there substantial and full compliance with the requirement for a hearing under Section 41, of the Employment Act, 2007 which provides that;

***41. (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor***

***performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.***

The Court of Appeal in addressing a matter similar as this one applied the provisions of section 43 of the Employment Act, 2007 and held that;

*Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.*

In this case, at the disciplinary hearing on 23<sup>rd</sup> July, 2016 it was apparent to the respondent that the claimant had removed or caused to be removed 2 troughs from the pack house and he had not been authorised to do so. Such conduct was found to be gross misconduct and theft

and under section 44(4) of the Employment Act, 2007 read together with the procedural requirements of section 41 and 43 the sanction of summary dismissal is found justified.

The claimant cannot sanitise his gross misconduct by offering to resign from his employment so as to earn service pay. Such would negate the due process he had been taken through and where it was established that he had engaged in theft of the 2 troughs. The sanction issued was lawful and justified.

In the written submissions the respondent at paragraph 24 had admitted to owing the claimant the following dues;

- a) Pay for days worked until 27<sup>th</sup> July, 2016;
- b) Leave days earned and not utilised up to 27<sup>th</sup> July, 2016;
- c) Overtime worked and not paid;
- d) Off days worked and not paid; and
- e) Certificate of service.

These dues are also offered under the letter of summary dismissal.

These should be addressed at the shop floor.

The claim for compensation is not due in a case where summary dismissal is found with good foundation and justified.

On the claim for gratuity, employment having terminated due to gross misconduct, without any collective agreement with regard to a negotiated payment for gratuity or a contract of employment setting this as a terminal benefit in such instance and taking into account that the claimant was registered and his statutory dues paid, such benefit is not due.

On the claim for house allowance, the claimant attached his payment statement for July, 2016 together with his Memorandum of Claim. Part of the benefits he was paid was a house allowance of Ksh.2,000. To hence claim for such benefits is without justification.

**Accordingly, the claims made are hereby dismissed. The claimant shall attend at the shop floor and his terminal dues tabulated in accordance with letter and notice of summary dismissal. Each party shall bear own costs.**

- a) Compensation for unfair dismissal;
- b) Gratuity pay for 6 years ksh.32,463;
- c) House allowances for 45 days Ksh.3,000; and
- d) Costs.

**Dated and delivered electronically this 11<sup>th</sup> May, 2020 at 0900 hours**

**M. MBARU JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship the Chief Justice on 15<sup>th</sup> March, 2020 the Order herein shall be delivered to the parties via emails.

this 11<sup>th</sup> May, 2020 at 0900 hours

**M. MBARU JUDGE**