



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**CASE NO. 2 OF 2018**

**FRANCIS NJAU MAINA.....CLAIMANT**

**VERSUS**

**MINI BAKERIES (NAIROBI) LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent seeking the determination of the dispute between them. He was a driver of the Respondent from 1<sup>st</sup> February 2015 earning Kshs. 20,696.66 a month plus a house allowance of Kshs. 6,209/- a month. He asserts that he served as a driver till the termination without prior notice or justification on 20<sup>th</sup> June 2017 and that at the time of dismissal was earning a basic salary of Kshs. 22,042/- and house allowance of Kshs. 6,488/-. He sought the unpaid salary for May and June 2017 – Kshs. 57,060/-, overtime payments for the month for May and June 2017 – Kshs. 21,194/-, leave accrued Kshs. 44,084/-, leave travel allowance for 2015 and 2016 – Kshs. 7,200/-, pension contribution refund/provident scheme contribution refund – Kshs. 69,340/-, 6 month's salary as compensation – Kshs. 171,180/-, money deposited with the Respondent as security at the time of employment – Kshs. 34,000/-, shortfall of the notice period – Kshs. 19,020/-, service pay at the rate of 17 days for each completed year of service – Kshs. 32,334/-, costs of the suit plus interest. He also sought a certificate of service.

2. The Respondent filed a defence in which it averred that the letter of appointment dated 15<sup>th</sup> January 2015 issued to the Claimant contained the terms and conditions of employment and this included summary dismissal for misconduct. The Respondent averred that the Claimant was issued a memorandum on 7<sup>th</sup> May 2015 when he was confirmed in appointment as a driver. The Respondent asserted that the Claimant was not entitled to the salaries he enumerated in his claim and that during his service he was intoxicated during working hours, was negligent in the performance of his duties, was guilty of absenteeism and willful neglect of his duties, disrespect of his superiors and insubordination. The Respondent averred that he was invited to a disciplinary hearing on 24<sup>th</sup> April 2017 for the gross misconduct. He responded through the letter of 23<sup>rd</sup> April 2017 that he had been attended to by a doctor and was on medication and that the disciplinary hearing was conducted on 25<sup>th</sup> April 2017 and issued him with a show cause letter on 27<sup>th</sup> April 2017 which he received on 2<sup>nd</sup> and a hearing duly conducted. The Respondent averred that the Claimant failed to properly give a proper defence and later any valid reasons for the review of the management's decision. The Respondent denied that the Claimant was unlawfully dismissed and that there were grounds for the dismissal of the Claimant from service. The Respondent asserted that there was no payment due for overtime, unpaid salary or pension contributions. The Respondent averred that the Claimant was entitled to a refund of the security deposit after reconciliation of the accounts with the Respondent. The Respondent averred that the claim for leave is payable subject to the days the Claimant took in advance are deducted as well as the *pro rata* leave travelling allowance. The Respondent averred that the Claimant's dues were processed and prepared but the Claimant declined to collect them and the suit was therefore premature and an abuse of the court process.

3. The Claimant testified as did the Claimant's witness Dr. Jackson Mboroki. The Respondent's witnesses David Odhiambo Miruka and Eric Mwende Gitobu. In his testimony, the Claimant denied that he was intoxicated during office hours or that he was insubordinate to his superiors. Dr. Mboroki stated that he treated the Claimant and issued him with a prescription and that is why the Claimant appeared drowsy while at work. The Respondent's witnesses on their part testified that the Claimant was inebriated and that he was not able to explain why he was drunk at the workplace. The issue of the Claimant seeking services at a clinic that was not registered or where the licence used was expired was raised by the Respondent's first witness and he testified that the clinic was found to be unregistered with the Board and that there was no record of the Claimant having sought treatment at the facility. The Claimant and Respondent were to file their submissions and the Claimant filed his submissions on 21<sup>st</sup> November 2018, and the file transmitted to me in early December 2018 to pen the judgment. As at the time of penning the judgment there were no submissions filed for the Respondent.

4. The Claimant submitted that the issues for determination were 3 – firstly, whether the Claimant's contract was unfairly terminated, secondly –whether the Claimant was entitled to any dues or benefits and lastly, who was to pay the costs of the suit. The Claimant submitted that he was unfairly dismissed by the Respondent and that he was not suspended nor was he given a notice of intention to dismiss him from

service prior to the dismissal. It was submitted that the minutes of the disciplinary meeting do not indicate the Claimant was found at work drunk or that he reported to work while drunk. He submitted that he was therefore unlawfully dismissed from work as there was no basis for the action taken by the Respondent and that he was entitled to recover the unpaid dues as well as the compensation he sought for the unlawful and unfair termination.

5. The Claimant was dismissed after being allegedly drunk while at work. The Respondent undertook a disciplinary process resulting in the dismissal. The Claimant was accused of reporting to work drunk and he was asked to give an explanation. When asked to explain he managed to produce the treatment notes. He was stated to have been treated on 20<sup>th</sup> April 2017 but was not issued with an outpatient number ostensibly as the doctor was rushing to Nairobi that morning. The Claimant was given 2 days off being the 21<sup>st</sup> and 22<sup>nd</sup> April 2017 per the treatment records he availed. He reported to work on 23<sup>rd</sup> April 2017 when the issues that brought about the suit arose. In his explanation to the employer on 23<sup>rd</sup> April, he indicated that he had forgotten to put his alarm clock on after the off and that he was under medication hence the condition that made him look drunk. The Claimant was terminated and at the time of termination was entitled to salary up to date of termination i.e. 30<sup>th</sup> June 2017, leave/pro rata leave earned but not utilized, shortfall of the leave period, leave travelling allowance proportionate, pension contribution refund and a certificate of service. Despite the Respondent asserting that the payment had been prepared, no document was availed showing the amount he was entitled to. The Claimant's dismissal though technically procedural had no factual basis for the haphazard manner his employ was brought to an end. Though there was an attempt to project the dismissal as for just cause, the Respondent did not ensure that it was not unfair or unlawful. The medications prescribed were capable of giving one drowsiness and the Respondent should have made further enquiries before jumping to dismiss the Claimant. He is therefore entitled to the following:-

- a. Kshs. 57,060/- being unpaid salary for May and June 2017,
- b. Kshs. 21,194/- as overtime,
- c. Kshs. 44,084/- being pay in lieu of accrued leave,
- d. Kshs. 7,200/- leave travel allowance,
- e. Kshs. 69,340/- pension contribution refund/provident scheme contribution refund –
- f. Kshs. 85,590/- being 3 month's salary compensation,
- g. Kshs. 34,000/- security deposit,
- h. Kshs. 19,020/- shortfall of the notice period,
- i. Interest on the sums above at court rates from date of judgment till payment in full.
- j. Certificate of Service.
- k. Costs of the suit.

It is so ordered.

**Dated and delivered at Nyeri this 29<sup>th</sup> day of January 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true

copy of the original

**DEPUTY REGISTRAR**