



**REPUBLIC OF KENYA**

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

**AT NYERI**

**CAUSE NO. 151 OF 2018**

**DANIEL MUTUA MWENDWA.....CLAIMANT**

**VERSUS**

**KENYA FRESH PRODUCE EXPORTERS LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant was an employee of the Respondent and he has sued the seeking recompense for the arbitrary dismissal. He claims that the sacking was unjustified, unlawful, and illegal and in breach of a contract of employment between him and the Respondent. He averred that the dismissal was contrary to the Employment laws of this land and in breach of the rules of natural justice. He asserts that he was employed by the Respondent as a general worker from 12<sup>th</sup> November 2012 to 11<sup>th</sup> February, 2018. He earned a salary of Kshs. 16,565/- per month. He avers the dismissal was without any reasonable cause or justification unilaterally. He contends that in effecting the dismissal, the Respondent abridged the rights he was entitled to prior to dismissal. He averred that he was not afforded an opportunity to defend himself and that there was failure to comply with the provisions of the Employment Act and the Collective Bargain Agreement. He sought payment of 3 months salary in lieu of notice – Kshs. 49,695/-, unpaid leave for the years worked – Kshs. 49,695/-, non-remittance of NSSF dues – Kshs. 30,240/-, house allowance of Kshs. 156,359.25, compensation for dismissal – Kshs. 198,780/- making a total of Kshs.484,949.25. He also sought general damages for the dismissal as well as costs of the suit and interest.

2. The Respondent filed a response and counterclaim. It denied unilaterally terminating the Claimant's employment on 11<sup>th</sup> February 2018 as claimed. It was averred that the Claimant performed the employment contract in a manner that fundamentally breached the said contract. He was accused of forging trade documents, uttering forged documents to the relevant authorities and customers which affected the Respondent's trade good will. He was said to have converted the Respondent's moneys by defrauding it and exposing it to legal sanctions and loss of business. He was accused of failing to perform his obligations by staying away from the workplace without the Respondent's consent, unequivocally indicating that he was no longer bound by the employment contract. The Respondent asserts that the Claimant repudiated the contract by indicating that the employment contract had come to an end on his part by his letter dated 28<sup>th</sup> March 2018. By way of counterclaim the Respondent asserts that the Claimant is liable to pay 3 month's salary in lieu of notice. The Respondent also claimed the sums it asserts the Claimant converted for his own use being Kshs. 150,000/-.

3. The Claimant testified that on 9<sup>th</sup> February 2018 he was called by Joe Kinyua to the boardroom where he met Police officers who took him to Embakasi police station where he recorded a statement and was informed of the reasons for his arrest at the Police station. He was accused of receiving Kshs. 80,000/- in cash from the office on 10<sup>th</sup> October 2017 to buy certificates for Euro One forms but he used less cash and did not remit the balance to the Respondent. He testified that he was not at work on that particular day and that he was off. However, he confirmed that he was called by one Joe Kinyua who requested him to accompany him to Forodha House where they would purchase the forms. He said hat it is Joe who was in custody of the money and that he is the one who made the payments after which he returned back home. He stated that he left Police cells after two days and that the Police informed him that the complainants did not turn up and therefore he was released after making a few payments. He went to the office after a day but he was denied access by the guard who told him that he instructed to deny the Claimant entry. He said that he went back home. He stated he was never informed prior to the arrest if there was any issue. Upon cross-examination he disputed the Respondent's averment that he had bought fake certificates. He reiterated that he was informed by the Police that he was given money to buy certificates but he bought less certificates. He further stated that he used to receive lots of money and cheques and he always did a return and was cleared by accounts. He further contended that he was never charged with making of illegal documents and that there was no accusation of theft against him. He testified that upon being declined access by the Respondent's security guards he never went back to work again.

4. The Respondent's witness Joe Kinyua an administration manager of the Respondent adopted his statement recorded on 31<sup>st</sup> May 2018 in which he accused the Claimant took more money than was used to acquire the forms at Forodha House. He testified that the forms the Claimant brought from KRA were irregular as they were already signed and were not signed at the point of shipment as required. He expressed his doubts over the genuineness of the forms to the cashier and a month later a KRA official called indicating one of the forms presented had his forged signature. They also received calls from their overseas customers indicating some of the forms were forgeries. He said that the Claimant was called for a disciplinary hearing on 9<sup>th</sup> February 2018 and when confronted with the evidence confessed he had

been getting the forms from fraudsters and they shared the money meant for the purchase of genuine ones. He stated that the Claimant had converted Kshs. 150,000/- to his use. He stated that he proceeded to make a report with the Police mindful that the accusation against the company on these forged certificates would jeopardize its business and lead to suspension of export licences. He stated that the Claimant was the one who had been obtaining the forms save for the day that he was on suspension. He admitted that he called the Claimant for assistance since the Claimant was the one familiar with the process. He testified that there was a time in 2017 they received a complaint from a client in Germany about the fake documents. They reported to the police and the issue is still under investigations. He testified that on 24<sup>th</sup> November 2017 the Claimant was given Kshs. 150,000/- from the company's account to purchase Euro forms for that amount but he however converted the whole amount and he has never refunded that cash or put it to the intended use. He maintained that they never terminated the Claimant's services and that he just decided not to report to work to date.

5. The parties filed their respective submissions as directed by the court. The Claimant filed his submissions on 7<sup>th</sup> February 2019 submitted that the Respondent violated Section 41 of the Employment Act by failing to give him a notice to show cause and afford him an explanation. He faulted it for the failure to give him a hearing before terminating his services. He submitted the summary dismissal was unfair as there were no valid reasons for the same. On the issue of the alleged misappropriated Kshs. 150,000, he submitted that the Respondent had only shown documents demonstrating that money was withdrawn but no document was produced showing that the money was channeled to his personal use. He submitted that the documents produced by the Respondent are a suspect since the Respondent was the custodian of the documents and they should have submitted the books of accounts instead of conveniently picking some few documents and use them to make wild allegations against him. He submitted that the Respondent was quick in issuing notice to show cause letters to him whenever an issue arose. He relied on the case of **David Gichana Omuya v Mombasa Maize Millers [2014] eKLR** and prayed that the court grants his prayers and dismisses the Respondent's counterclaim in its entirety as he has proved his case on a balance of probability.

6. The Respondent submitted that the Claimant was not terminated from work and that it was actually the Claimant who had failed to report to work upon release from Police custody. The Respondent submitted that the onus of proving the discontinuance of employment lies with the employee and that where there is no evidence to establish such discontinuance by employer, the claim in respect thereof fails. It relied on the case of **Price v Guest, Keen, & Nettle Folds (1918) UKHL**. The Respondent submitted that a contract of employment is subject to the general principles of contract law and that by failing to report to work, the Claimant fundamentally breached the contract thereby repudiating the same. The Respondent submitted that the Claimant is not entitled to the declaration sought or the damages sought. The Respondent submitted that it is the non-defaulting party that should be compensated for repudiatory breach of a contract.

7. The Claimant did not produce any evidence of termination. He even confirmed from his testimony that he went to the Respondent's premises and asserts that he was denied access by the guard who was acting on instructions from above. He does not tell the court who gave the instructions and why he decided not to go to work from that day to date. If indeed what he alleged is what transpired the Claimant was not terminated by the Respondent or the Respondent's officers. From the testimony adduced as well as the evidence on record there is no nexus shown between the guard and the Respondent. He has not shown what attempts he has made to reach the employer and discuss his predicament with them. He agreed he helped the Respondent's witness to acquire the Euro forms from KRA. He did not lead any evidence in contravention of the Respondent's assertion that he obtained Euro forms for less amounts or that he obtained Kshs. 150,000 from the Respondent's accounts and misappropriated it. He only submitted that the Respondent did not show anything indicating that the money was channeled to the Claimant's personal use. He thus did not deny misappropriating or receiving the money. No letter of termination was issued to the Claimant in respect to his termination and he therefore was not unlawfully dismissed as alleged. He was to give one month notice of intention to terminate the contract and he thus is required to pay the one month notice of Kshs. 49,695/-. The Claimant should also pay the sum of Kshs. 150,000/- he misapplied and which is due to the Respondent. Each party will however bear their own costs. In the final analysis I enter judgement for the Respondent against the Claimant for:-

- a. Kshs. 49,695/- in lieu of 1 month notice due to the Respondent.
- b. Kshs. 150,000/- misapplied and which is due to the Respondent.
- c. Each party will however bear their own costs.

It is so ordered.

**Dated and delivered at Nyeri this 26<sup>th</sup> day of March 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**