



**REPUBLIC OF KENYA**

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

**CAUSE NO. 349, 350 & 351 OF 2017**

**1. ANTHONY NGUTA MUNYWOKI**

**2. VINCENT MWALILI NTHIW'A**

**3. VINCENT MUTUKU NZUKA.....CLAIMANTS**

**VERSUS**

**COUNTY SUPERMARKETS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimants sued the Respondent in 3 different and distinct cases consolidated purely for purposes of hearing. They assert that they were employees of the Respondent, a supermarket and that they worked as bakers. They sought to have the issues they framed as unfair and unlawful dismissal, unremitted statutory deductions, non-payment of terminal dues, discrimination and other benefits arrears resolved.

2. For Anthony Nguta Munywoki, the Claimant in Cause 349 of 2017, it was averred that he was employed as a bread baker on 11<sup>th</sup> June 2016 with a starting salary of Kshs. 16,000/- per month and that he was not issued with an official contract though there was an oral agreement to that effect and he was never issued with a payslip though the Respondent used to deposit the salary into his account less statutory deductions. He averred that on 5<sup>th</sup> April 2017 at 2.00pm just when he had arrived for work, without any justification, the Respondent's assistant manager summoned him and told him his contract had been terminated. He averred that he was not issued with a notice to show cause and no disciplinary committee was constituted to hear and determine any allegations against the Claimant. He averred that this contravened the Employment Act and the rules of natural justice. He averred that for the 11 months he had worked for the Respondent he had not been allowed any leave days and that though the Respondent had been deducting statutory dues as required by law, the said amounts were never remitted to the respective bodies. He thus sought the payment of 1 month salary in lieu of notice – Kshs. 16,000/-, 12 months salary as compensation for unlawful dismissal – Kshs. 192,000/-, unpaid leave days – Kshs. 15,385/-, unpaid house allowance – Kshs. 33,000/-, unpaid NSSF dues for 10 months – Kshs. 8,400/-, gratuity/severance pay – Kshs. 18,462/- as well as interest on the sums claimed at court rates from the date each payment fell due till payment in full as well as a certificate of service and costs of the suit.

3. For Vincent Mwalili Nthiw'a the Claimant in Cause 350 of 2017, it was averred that he was employed as a bread baker on 16<sup>th</sup> March 2014 with a starting salary of Kshs. 18,000/- per month and that he was not issued with an official contract though there was an oral agreement to that effect and he was never issued with a payslip though the Respondent used to deposit the salary into his account less statutory deductions. He averred that on 7<sup>th</sup> April 2017 at 2.00pm just when he had arrived for work, without any justification, the Respondent's assistant manager summoned him and told him his contract had been terminated. He averred that he was not issued with a notice to show cause and no disciplinary committee was constituted to hear and determine any allegations against the Claimant. He averred that this contravened the Employment Act and the rules of natural justice. He averred that though the Respondent had been deducting statutory dues as required by law, the said amounts were never remitted to the respective bodies. He thus sought the payment of 1 month salary in lieu of notice – Kshs. 18,000/-, 12 months salary as compensation for unlawful dismissal – Kshs. 216,000/-, unpaid leave days for three years – Kshs. 62,308/-, unpaid house allowance – Kshs. 108,000/-, unpaid NSSF dues for 6 months – Kshs. 5,040/-, gratuity/severance pay – Kshs. 56,077/- as well as interest on the sums claimed at court rates from the date each payment fell due till payment in full as well as a certificate of service and costs of the suit.

4. For Vincent Mutuku Nzuki, the Claimant in Cause 351 of 2017, it was averred that he was employed as a bread baker on 20<sup>th</sup> August 2014 with a starting salary of Kshs. 16,000/- per month and that he was not issued with an official contract though there was an oral agreement to that effect and he was never issued with a payslip though the Respondent used to deposit the salary into his account less statutory deductions. He averred that on 6<sup>th</sup> April 2017 at 2.00pm just when he had arrived for work, without any justification, the Respondent's assistant manager summoned him and told him his employment contract was being terminated. He averred that he was not issued with a notice to show cause and no disciplinary committee was constituted to hear and determine any allegations against the Claimant. He averred that this contravened the Employment Act and the rules of natural justice. He averred that though the Respondent had been deducting statutory dues as required by law, the said amounts were never remitted to the respective bodies. He thus sought the payment of 1 month salary in lieu of notice – Kshs. 16,000/-, 12 months salary as compensation for unlawful dismissal – Kshs. 192,000/-, unpaid leave

days – Kshs. 32,000/-, unpaid house allowance – Kshs. 167,100/-, unpaid NSSF dues for 12 months – Kshs. 10,080/-, gratuity/severance pay – Kshs. 49,846/- as well as interest on the sums claimed at court rates from the date each payment fell due till payment in full as well as a certificate of service and costs of the suit.

5. The Respondent filed defences against the three claims and in each memorandum of response averred that the Respondent had received information that the Claimants used to steal sugar and yeast used in baking bread by putting the yeast and sugar in their clothes along the waist and socks. The Respondent carried out investigations and established that there was loss of the inputs and therefore decided to suspend the Claimants and that on 10<sup>th</sup> April 2017 the Respondent invited them to a disciplinary hearing on 15<sup>th</sup> May 2017 at 2.00pm. The Respondent averred that the Claimants were given an opportunity to defend themselves but they refused to show up and management upon deliberating on the issue decided to terminate the employment forthwith for gross misconduct. The Respondent averred that from the foregoing, the allegations of breach of the rules of natural justice, good labour practices and the Employment Act did not apply. The Respondent averred the Claimants were not entitled to the reliefs listed in their respective claims and that the suits should be dismissed with costs.

6. The Claimants testified in the absence of the Respondent who had been present when the date was taken in November 2018. The Claimants all stated that they were dismissed with no adherence to the provisions of the law. The Claimants stated that statutory deductions were never remitted despite the Respondent dutifully deducting them each month. The Claimants stated that they were not heard before the dismissal. They stated that they were dismissed on account of ethnicity and because the Respondent believed that they were Orange Democratic Movement (ODM) supporters. The Respondent attempted to re-open the hearing of the cases but the reasons advanced were not sufficient basis for the re-opening the cases and the Respondent was ordered to file submissions as directed by the court in absentia.

7. The Claimants filed submissions in which they submitted that under the law they were entitled to an explanation prior to their dismissal on grounds of misconduct and that they were entitled to have a fellow employee of their choice present during the explanation. The Claimants submitted that the Respondent was not entitled to terminate without notice or with less than the notice required under the provisions of the law. The Claimants submitted that no single warning was issued to the Claimants nor was any show cause issued to them. The Claimants submitted that the Employment Act Section 19(4), (5) and (6) provided for the deduction and remittance of statutory dues and provides sanction for any employer who fails to do so. The Claimants submitted that the court could in addition to finding that the employer in breach of this Section order the employer to refund to the employee the amount deducted from the employee's wages. On the discrimination aspect, the Claimants submitted that the Constitution of Kenya under Article 27(4) of the Constitution makes provision that no person shall discriminate directly or indirectly against another person based on his race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress or language. The Claimants submitted that the Employment Act under Section 5(3) also stipulates that no employer shall discriminate directly or indirectly against an employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status. The Claimants submit that the Section goes ahead to provide that in any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged. The Claimants allege that the issues with the Respondent begun due to their ethnic background and because the Respondent viewed them as Orange Democratic Movement (ODM) supporters. The Claimants submitted that they had proved their cases on a balance of probabilities and they thus urged the Court to allow their claims as prayed for in their respective claims.

8. The Respondent filed submissions and stated that the Claimants were suspended from employment and were invited for a disciplinary hearing, a fact that was within their lawyer's knowledge as during the suspension a demand letter was sent to the Respondent and the advocate for the Claimants duly notified of the date for the disciplinary hearing. The Respondent submitted that as can be seen from the letters attached to their claims, the lawyer was notified that he could accompany the Claimants to the disciplinary hearing. The Respondent submitted that the Claimants were given an opportunity to defend themselves but instead opted not to avail of that opportunity and that the claims for unfair termination were not tenable. The Respondent submitted that the principle in fair termination was stated by the court in **Justus Mutahi Ihaji v Kenya Airways Limited [2018] eKLR** where the court stated that for termination to be fair there must be both substantive justification and procedural fairness. The Respondent submitted that the dismissals were for a valid reason and there was no basis for a claim of unlawful or unfair dismissal. The Respondent submitted that there was no evidence that the statutory deductions were not made and stated that there were avenues for the Claimants to pursue with NHIF, NSSF and KRA if the sums were not remitted by the Respondent. The Respondent thus urged the dismissal of the claims by the 3 Claimants.

9. The Claimants claims morphed as nowhere in their pleadings did they allege discrimination on the grounds of ethnicity or support for a political party. Their claims were as enunciated in the first 3 paragraphs of this judgment. The Claimant's attached correspondence from their Advocates to the Respondent but they did not attach the replies. The Respondent provided the replies which clearly indicate that in the response to the demand letter sent in April 2017 prior to the dismissals in May 2017, the lawyer was notified of the suspension of the Claimants and that they were summoned vide copies of letters enclosed to attend and defend themselves at the disciplinary hearing scheduled for 15<sup>th</sup> May 2017. The lawyers were notified that they could accompany the Claimants. The claims were therefore premised on a lie that the Claimants were not given an opportunity to defend themselves contrary to the provisions of the Employment Act and the cardinal rules of natural justice. In addition, the Claimants were not candid in their assertion that they had no idea why they were sent home in April. None of them mentioned the correspondence with their advocate relative to their disciplinary hearings. Regarding the matter of alleged discrimination, the issue only arose in testimony and submissions and was not pleaded. The Constitution of Kenya is not a document to be bandied lightly and thrust into any conflict without basis. It is the compact by which Kenyans have agreed to be governed. When it is infringed, the infringement is to be frowned upon. It is not something one can forget and only conveniently remember at a hearing and base their submissions on Article 27(4). Not a single authority was cited by the Claimants in support of their claim. If indeed there was infringement of this Constitutional right there would be a plethora of decisions. Clearly this line of submissions was but a red herring to goad the court to grant relief where none is available and where there is no basis for the grant. The suits by the 3 are not proved on a balance of probability as required in law and are only fit for dismissal. I dismiss each of the 3 suits with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nyeri this 21<sup>st</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**