



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 137 OF 2017

BETWEEN

PATRICK MUSYOKA MWILUCLAIMANT

VERSUS

MOMBASA MAIZE MILLERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

I R B Mbuya & Company Advocates for the Claimant

M/S V.N. Okata & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 17th February 2017. He avers that he was employed by the Respondent as an Electrician, from 13th February 2008 to 7th June 2016. His last salary was Kshs. 41,000 monthly. He was summarily dismissed on 7th June 2016. He was not given a specific reason for termination, but suspected it was on the allegation that he had failed to service motors, at Respondent's premises. He asks the Court to find his contract was unfairly terminated and grant him Judgment against the Respondent, in the following terms:-

- a. 1 month salary in lieu of notice at Kshs. 35,446.
- b. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 425,352.
- c. Any other suitable order.
- d. Costs.
- e. Interest.

2. The Respondent filed its Statement of Response on 10th April 2017. It is agreed that the Claimant was employed by the Respondent as an Electrician, from 13th February 2008. His last gross monthly salary was Kshs. 43,489, with a basic rate of Kshs. 35,445. He was diligent until the year 2015 when he started having problems with his seniors. He received a warning letter on 2nd February 2016, from Respondent's Director, concerning his failure or refusal to keep daily records on the motors. He refused to reply to the letter. He received a letter to show cause, dated 22nd June 2016, on his refusal to keep daily records of the motor, and on his misuse of 30 metre cable entrusted to him. He wrote to the Respondent on 23rd June 2016, stating he was not able to keep records as required, and asked the Respondent to release him, upon payment of terminal benefits. He was called to a disciplinary hearing on 28th June 2016. He attended and was heard, in the company of one Titus Mulatya. He continued to sabotage Respondent's factory. He was paid his terminal dues on 7th July 2016, and summarily

dismissed. He received a sum of Kshs. 18,925 from the Respondent as terminal benefits. His prayers have no merit. The Respondent urges the Court to dismiss the Claim with costs.

3. The Claimant gave evidence, and rested his case, on 24th September 2018. Technical/ General Fitter, Titus Musaki Mulatya, gave evidence for the Respondent on 24th September 2018. Human Resource Officer, Stanslous Kahindi Baya, closed the hearing with his evidence, given on 5th December 2018. The Claim was last mentioned on 19th March 2019, when the Parties confirmed filing of their Closing Submissions.

4. The Claimant told the Court that he worked with other 5 Electricians. He supervised them. They maintained Respondent's electrical tools of trade, including machinery. There were about 3000 motors in Respondent's machines. There were 2 machines for wheat and 2 for maize.

5. The Electricians worked in shifts, day and night. There was 1 book for recording metre readings for electricity. The Claimant went on annual leave for 21 days in June 2016. On return, he found 6 other recording books had been introduced.

6. It was not possible to record readings in all the 6 books in 1 day. There were other duties to be done. The Claimant could not record readings in 3000 motors in 1 day.

7. He received letter to show cause, dated 22nd March 2016. There were 2 accusations- refusal to make recording of motor readings and misuse of cable.

8. The cable was purchased for sensor job. It is not true that the Claimant misused it. He fixed it as instructed. He did not convert it to his own use. He explained it was not possible to file daily reports. 3 of the Electricians were trainees who could not handle certain tasks.

9. The Claimant was taken through a disciplinary hearing as stated by the Respondent. He received the letter of summary dismissal.

10. He worked for 8 years. The accusations against him had no justification. He could not have lasted 8 years, if given to pilferage of Respondent's items.

11. Cross-examined, the Claimant told the Court that he started off as a Supervisor in 2008. He was in supervisory role throughout. He did not fail in his duties. He prepared reports, but could not do so within the time desired by the Respondent.

12. It is not true that he reported to Engineer Njoroge. The Claimant did not refuse to work with this Engineer, in October 2015. The Engineer wrote a letter to the Respondent complaining about the Claimant. The other Electricians declined to fill the additional recording books. The Claimant did not prevail upon them to fill the books. The Claimant received letter to show cause. He did not recall offering to resign on the condition that he was paid his terminal dues. He said the Respondent should release him, and pay him his terminal dues. He was heard at the disciplinary forum, in the company of a Co-Employee, Titus. He had sufficient notice of the hearing. He was ready for the hearing. He did not agree with the procedure. The decision was abrupt. The Claimant used to engage general labourers for the Respondent. He did not come across any labourer, who declined Claimant's instructions.

13. Redirected, the Claimant told the Court he told the Respondent to release him, because he was under pressure. Engineer Njoroge thought the Claimant was slow. The Claimant was performing his duty to the best of his ability. Other Electricians told the Claimant they were advised by the Respondent, not to fill the additional books until the Claimant returned from his annual leave.

14. Titus Musaki Mulatya told the Court he worked with the Claimant in the workshop department. Engineer Njoroge headed the department. Claimant maintained machine motors. He was an Electrician.

15. There was a faulty packing machine. It was not producing maximally. The Claimant was asked to repair it. He delayed. The Director had to call Engineer Njoroge and other Electricians. The Claimant declined to work with others. Engineer Njoroge called the Claimant to avail the multimetre. This gadget was used in reading motor metres. The Claimant refused to play his part. The Respondent had 2 Branches, each with about 6 Electricians. The Claimant could have instructed other Electricians to take the readings. There were about 100 motors, not 3000 as asserted by the Claimant. It was not a lot of work to take readings. Titus confirmed he attended the disciplinary hearing accompanying the Claimant.

16. On cross-examination, Titus testified that he worked for both Branches of the Respondent. He is a Technician. He maintained generators. He was himself not an Electrician. The Claimant asked Titus to accompany him to the disciplinary hearing, because Titus was Claimant's friend. Both Employees also hailed from Kitui County. Titus did not defend the Claimant at the hearing. He did not assist the Employer's cause. He never saw the faulty packing machine. He was told about it by Engineer Njoroge. He did not have evidence to show there were only 100 motors. He did know names of other Electricians. He did not know how to read metres. It was recommended after disciplinary hearing that the Claimant is transferred. Redirected, Titus told the Court it was the Claimant, who invited him to the disciplinary hearing. Metre-reading is uncomplicated and does not take a lot of time.

17. Human Resource Officer Baya, confirmed details of the Claimant's employment. The Claimant was given a warning letter on 2nd February 2016, for failing to perform his task. He was asked by the Director Mubarak, to prepare a list of all motors indicating their worthiness. He was to ensure the motors were working well. There was a gadget used for measuring motor heat, to prevent damage to the machines.

18. The Claimant was issued a letter to show cause. He replied saying he was unable to take readings because the machines were running. The reading was actually supposed to be done while the machines were running.

19. He was subjected to disciplinary hearing. He attended in the company of Titus. It was resolved that the Claimant is transferred. The Director held a different view. He said as the Claimant had severally been warned, his contract should be terminated.

20. The Human Resource Officer testified upon cross-examination that he has a diploma in Human Resource Management. He is not an electrician and is not conversant with electrical field. The Respondent had 2 Branches- Millie and Mombasa Maize Millers- in Mombasa. Machines are at Millie. They have about 120 motors. Engineer Njoroge was called for advice. The Claimant refused to assist the Engineer. The disciplinary committee recommended transfer based on certain facts. Transfer did not take place. The Directors advised against transfer, and terminated Claimant's contract. The Claimant was not able to account for the cable.

The Court Finds: -

21. There is no dispute that the Claimant was employed by the Respondent as an Electrician, from 13th February 2008 to 7th June 2016. He was a Supervisor, with about 6 other Electricians under him. He lastly earned a gross monthly salary of Kshs. 43,489.

22. The Claimant was summarily dismissed through a letter dated 7th July 2016. The Respondent cites Section 44 [4] [c] and [e] of the Employment Act in justifying its decision. This law makes it an employment offence, punishable by summary dismissal, where an Employee wilfully neglects to perform his duty, or performs carelessly and negligently; and where an Employee knowingly fails or refuses to obey a lawful and proper command which is within his scope of duty to obey, issued by his Employer or a person placed in authority by his Employer.

23. The charges against the Claimant, as disclosed in the letter of summary dismissal, are that in 2015, the Claimant was instructed by the Respondent, to monitor the performance of several motors in the factory, to determine their relative worth. It had been established that some of them were not giving optimal value. They would get spoilt within very short time. Several books were issued to the Claimant to record motor servicing. The Claimant refused, neglected and or failed to delegate the task, resulting in the work not being done. The Claimant had 2 written warnings on the subject, but took no remedial measures.

24. This was the reason stated in the letter of summary dismissal as justifying termination. There was no mention of the Claimant having converted a cable to his own use, and the Court shall therefore ignore this, in considering validity of reason in termination of Claimant's employment.

25. There was a warning letter issued by the Respondent to the Claimant on his inability or unwillingness to service the motors. The letter, dated 2nd February 2016, records Claimant's failure and his excuse for failure. He alleged the task was unattainable. He repeated this excuse in Court, alleging there were about 3000 motors to be attended to. The warning letter brings it to the attention of the Claimant that servicing of motors at Respondent's Kisumu City Branch, had taken place without hitch, and assisted the Respondent in control and replacement of motors. The Claimant was warned against his refusal to take lawful command.

26. This was followed by the letter to show cause, issued in June 2016. The same accusation was made against the Claimant. It is revealed that several meetings had taken place between the Parties, ostensibly to implore the Claimant, to play his part with regard to servicing of motors.

27. The Claimant gave his response in a letter dated 23rd June 2016. He states he and his charges, attempted to work on the worthiness of the motors for about 2 weeks. They found the undertaking dangerous, and the motors were many. He consulted the Director who advised he did not have a problem with the Claimant. Another Senior called Hamed, however, told the Claimant he did not want to see the Claimant at the workplace. The Claimant pointedly asked the Respondent to release him, and pay his terminal dues.

28. The Respondent did not release the Claimant immediately as requested. The Claimant was called to a disciplinary hearing on 29th June 2016. He was accompanied by a Co-Employee, who was Respondent's Witness in this Claim, Titus Mulatya.

29. The minutes of this meeting do not agree with the Claimant's earlier explanation, that servicing of the motors was a dangerous and unachievable undertaking. He instead stated that he had done some reports before going on leave, and left the job to a Trainee. When he returned, he found the Trainee had left employment. This explanation diverges from the earlier one made by the Claimant.

30. He also stated at the disciplinary hearing that there were over 100 motors in the new mill, and a further 100 motors in the old mill. This does not suggest that there were 3000 motors, the number given by the Claimant in his evidence in Court, which would have justified the claim that owing to this large number, it was impossible to meet the expectation of the Respondent. It was confirmed at the meeting that a similar task had been undertaken at Respondent's Kisumu Plant. The Claimant is recorded in the proceedings of the disciplinary hearing, to have admitted wrongdoing, and promised to improve if given another chance.

31. The disciplinary panel recommended he is laterally transferred, terming the Claimant as a habitual offender, who was likely to be involved in another disciplinary hearing. The Directors did not accept this recommendation, instead imposing the sanction of summary dismissal on the Claimant.

32. In the view of the Court, termination was based on valid ground. It was made after warning issued in writing. The Claimant was given the benefit of serial meetings. The same issue was placed before him, and opportunity given for the Claimant to correct his shortcomings. He was a Supervisor who failed to apply himself fully, and utilize the other Electricians at his disposal, to achieve the task assigned to his department by the Respondent. This same task had been accomplished at Respondent's Branch in Kisumu. There was no wheel being reinvented. He gave various inconsistent reasons for his failure: there were 3000 motors; there were over 100 motors in the new mill and a further 100 motors in the old mill; it was not possible to make recordings in 6 books; there were other duties to be done; the other Electricians were Trainees; he entrusted the task to a Trainee who left before completion of the task; Trainees could not handle certain tasks;

the task was dangerous; he attempted to perform the assigned work for about 2 weeks; and Hamed did not want to see the Claimant continue to work.

33. These were inconsistent and unpersuasive excuses, reminiscent of a once popular TV advert, where a Pupil, who fails to do his homework, explains to his Teacher, that he failed to do his homework, because the dog ate his homework.

34. Procedure cannot be faulted.

35. The Claimant's Co-Employee Titus, who accompanied the Claimant to the disciplinary hearing, on the invitation of the Claimant, attested to the fairness of termination before this Court. He was selected by the Claimant to accompany him, based on the friendship and trust between the Claimant and Titus. The Court was told that the 2 are from the same County of Kitui. It is unlikely that Titus would, as suggested by the Claimant, give evidence in Court merely to assist the Respondent. He appeared to the Court to give a truthful account of the disciplinary proceedings and of the circumstances surrounding his friend's dismissal.

36. At the end of it all, the Claimant received Kshs. 18,925 on 12th July 2016. He signed discharge voucher. He states on the discharge, *"I confirm I have no further claim[s] present or in the future, against this Company or their agents, in respect of the above claim[s]."* He did not contest the sum paid as terminal dues. He was a Supervisor, an Electrician, an erudite Man, not unaware about his final benefits.

37. Having earlier expressed his wish to be released upon payment of terminal dues, it is not proper that the Claimant instigates claim for additional benefits and compensation, after he was paid his dues, and discharged the Respondent.

38. ***The Claim has no merit and is declined with no order on the costs.***

Dated and delivered at Mombasa this 13th day of June 2019.

James Rika

Judge