



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 441 OF 2017

DOUGLAS MAINA KAMAU.....CLAIMANT

VERSUS

KIBIRIGWI FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent who was his erstwhile employer. The Claimant averred that he was employed by the Respondent as a night watchman on 3rd June 2011. He averred that his salary was Kshs. 6,969/- a month. He averred that following an incident of coffee theft on the night of 3rd-4th June 2016 at the Respondent's Kibingoti Factory where the Claimant was stationed, he was arrested and prosecuted at Baricho Law Courts for the theft of the coffee or alternatively for failing to stop a felony vide criminal case No. 764 of 2016 but was acquitted of any wrongdoing on 3rd August 2017. He averred that vide a letter dated 4th June 2016 the Respondent summarily dismissed the Claimant from its employment citing the theft of coffee at Kibingoti Factory as the basis for the summary dismissal, and without giving him an opportunity to be heard. He averred that upon acquittal he visited the offices of the Respondent for reinstatement and even wrote a letter over the same on 21st August 2017 to no avail yet other night watchmen who were on duty with the Claimant on the fateful night and who were charged alongside him were reinstated upon the said acquittal. He averred that he was entitled to payment of half salary during the period between 4th June 2016 and 3rd August 2017 when he was acquitted amounting to Kshs. 48,783/-. He also sought compensation for loss of employment at the statutory rate of 12 months amounting to Kshs. 83,682/-, gratuity for the 7 years worked – Kshs. 48,783/-, salary in lieu of annual leave for the last 3 years of employment – Kshs. 20,907/-, salary in lieu of weekly rest for 3 years – Kshs. 36,238.80. The Claimant averred that he used to work from 6.00pm to 8.00am every day thus working for an extra 6 hours per day without pay and sought payment of Kshs. 190,776/-, legal expenses incurred in his defence at Baricho Law Court – Kshs. 150,000/- as well as a certificate of service and costs of the suit.

2. The Respondent in its defence averred that the Claimant's dismissal was based on reasonable and sufficient grounds and was anchored on the undisputed fact that the Respondent's property was stolen while the Claimant was on duty. The Respondent averred that on investigations by the Police the Claimant was suspected of having committed a criminal offence and accordingly charged in court over the said theft. The Respondent averred that the criminal charges preferred against the Claimant by the Police amounted to gross misconduct within the meaning of Section 44(4)(g) of the Employment Act to warrant summary dismissal. The Respondent averred that the Claimant was dismissed for having acted in a manner detrimental to the interests of the Respondent. The Respondent averred that the action amounted to a breach of the Claimant's employment with the Respondent to give a right to the summary dismissal. The Respondent denied the other watchmen had been reinstated and put the Claimant to strict proof of his allegations. The Respondent averred that the dismissal was lawful and justified and as such he was not entitled to half salary as is alleged and claimed. The Respondent averred that the Claimant was a member of the NSSF and statutory deductions were made on his behalf thus disentitling him to gratuity. The Respondent urged the dismissal of the claim with costs.

3. The Claimant filed a reply to the response in which he averred that the Respondent never gave the Police a chance to investigate the matter hence his arrest immediately upon arrival of the Police officers at the scene. The Claimant averred that the Respondent never gave him an opportunity to defend himself. He sought the dismissal of the response with costs.

4. The Claimant testified that he was dismissed without cause by the Respondent as the case was dismissed and he was acquitted. He stated that there was no culpability on their part and that he sought reinstatement but the Respondent did not reinstate him.

5. The parties filed submissions in which the Claimant submitted that he was not given a chance to be heard after the incident as he was in Police custody. He relied on the case of **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2018] eKLR** where the court held that for termination to be considered valid there should be notification before dismissal on grounds of misconduct. He submitted that the Respondent failed to prove the reasons for the dismissal were valid. He submitted that *ipso facto* the remedies sought in the claim were not impeached and that he was entitled to the payment of half salary for the period he was undergoing trial as well as the other claims in the suit.

6. The Respondent submitted that the dismissal of the Claimant was lawful and that he was not entitled to the remedies sought. The

Respondent submitted that the provisions of Section 44(3) permits the employer to dismiss the employee who has fundamentally breached his obligations arising under the contract. It submitted that the dismissal of the Claimant was pursuant to the coffee theft and that the theft led to the indictment of the Claimant and his being put on his defence in the criminal trial. The Respondent submitted that it adhered to the procedural requirements under Section 41 of the Employment Act and afforded the Claimant a fair hearing. The Respondent relied on the case of **Boniface Francis Mwangi v B.O.M Iyego Secondary School [2019] eKLR** where the court gave compensation of 6 months. The Respondent urged the court to apply a multiplier of 6 months if an award is found suitable for the Claimant. The Respondent submitted that the Claimant did not discharge his burden of proof on the overtime and other reliefs sought. It placed reliance on the case of **Miss Nduta Mbite v John Gachau Gitonga Civil Appeal No. 299 of 2015**. The Respondent submitted that the Claimant had failed to present evidence of the legal fees he asserts he paid. The Respondent thus urged the dismissal of the Claimant's suit.

7. The Claimant was dismissed after a theft that occurred at the Respondent's Kibingoti Factory where the Claimant and 2 others were guards. The Claimant was subsequently discharged by the criminal court in August 2017. He asserts that he sought reinstatement and the Respondent declined to reinstate him. In the dismissal, the Claimant was allegedly dismissed for his involvement in the matters the Respondent asserts are a breach of the employment contract and which permit the employer under Section 44 of the Employment Act to dismiss an employee summarily. Whereas the employer has every right to dismiss an employee summarily as provided for under Section 44, the employer must adhere to the dictates of the law when doing so. The Claimant is entitled to recover for the unlawful dismissal. He failed to prove the claims for overtime, leave gratuity and rest days. These claims were supposed to have been raised during the pendency of his employment. He attempts to recover at this late juncture for things he should have sought reprieve for in terms of Section 90 of the Employment Act. He further failed to prove the special damages being the legal expenses he alleges were incurred in his defence before the criminal trial court. He thus is only entitled to:-

- i. One month's salary in lieu of notice – Kshs. 6,969/-;
- ii. 6 month's salary for the unlawful dismissal – 41,814/-;
- iii. Certificate of service;
- iv. Costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 18th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar