



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 108 OF 2016

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed suit on 5th May 2016, seeking reinstatement to employment and in the alternative maximum compensation for the summary dismissal and payment of terminal benefits set out under paragraph 35 (a) to (e) of the memorandum of claim.
2. CW1, the grievant testified that he was Walter Amisi and employed by the respondent on 27th October 2005 as a shop assistant stationed at Embakasi Branch. That he was internally trained to work in the information Technology Department. That on 10th March 2010, he was transferred to Nakumatt Kakamega Branch as procurement General Assistant Trainee. The employment in that capacity was confirmed in September 2018.
3. On 6th March 2015, CW1 erroneously informed the category leader Mr. Kimani that some items listed under paragraph 11 of the memorandum of claim were not available in the shop.
4. Upon careful check-up, CW1 discovered the items he had earlier communicated as not available were actually available. CW1 immediately informed Mr. Kimani accordingly and the goods were transferred back to the supplier on 13th April 2015 at Nairobi Sports House Limited.
5. On 13th April 2015, CW1 received letter of suspension and was invited to attend a disciplinary Committee on 15th April 2015. The claimant explained his version of events at the hearing. He was charged with failure to obey senior's instruction to take stock as instructed on 21st April 2015. The claimant was summarily dismissed but received another letter reducing the summary dismissal to normal termination. The claimant was to be paid one month salary in lieu of notice. The claimant was not paid in lieu of leave days not taken, service gratuity for 9 years, overtime worked and pension benefits which he now claims.
6. The dispute could not be settled internally upon intervention by the union. It was then reported to the Ministry of Labour.
7. The claimant denies that he committed gross misconduct to warrant summary dismissal and/or termination of employment. The claimant prays that the termination be declared unlawful and unfair and that he be reinstated to his earlier job and in the alternative he be paid terminal benefits and maximum compensation set out in his testimony and memorandum of claim.
8. The respondent filed response to the claimant's memorandum of claim on 18th July 2016. The respondent however failed to participate in the hearing on 29th October 2018 despite service of a hearing notice dated 24th August 2018. The claimant's testimony remains uncontroverted.
9. The issue for determination is whether the termination of the claimant was for a valid reason and if the respondent followed a fair procedure.
10. From the uncontroverted testimony by the claimant, he was given a notice to show cause and invited to attend a disciplinary hearing in which he fully participated. That the disciplinary Committee found him guilty of gross misconduct and summarily dismissed him from

employment. The summary dismissal was however commuted to normal termination. Furthermore, from his own recorded testimony, the claimant admitted having erroneously communicated to the Category Leader Mr. Kimani on 6th March 2015 that stocks listed by the claimant in the statement of claim were not available when in fact same were available. That this error led to ordering of more stock from Nairobi Sports House Limited, which stock had then to be returned to the Nairobi head office. This led to the claimant's suspension and eventual termination of employment.

11. From facts not in dispute, it would appear that there was a valid reason to terminate the employment of the claimant. It would also appear that the respondent followed a fair procedure in terminating the employment of the claimant.

12. The onus of proving that the termination was not for a valid reason and was not done in terms of a fair procedure is on the claimant on a balance of probabilities in terms of *Sections 107 and 108 of the Evidence Act, Cap 80 laws of Kenya*. The claimant has failed to discharge that onus. The court therefore finds that the respondent had a valid reason to terminate the employment of the claimant and in doing so, the respondent followed a fair procedure. The case for unlawful and unfair termination of employment is dismissed.

Terminal benefits

Notice Pay

13. The summary dismissal was commuted to normal termination by the respondent and therefore the claimant is entitled to payment of (a) Kshs. 40,123.50 in lieu of one and a half month notice.

(b) **Leave Pay** - The claim for payment in lieu of leave in the sum of Kshs. 13, 668 has been proved and is granted.

(c) **Arrear Salary** – Payment of 21 days worked in April 2013 in the sum of Kshs. 18,719 has been proved and is granted.

(d) **Overtime** – The claim for overtime worked has not been controverted and is granted in the sum of Kshs. 23,759.

(e) **Service Pay** – The claimant was not retrenched. The claimant was a member of NSSF and NSSF dues were deducted and paid on his behalf. The claim for payment of service pay lack merit and is dismissed.

14. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows:

(a) Kshs. 40,123.50 being payment in lieu of one and a half month notice.

(b) Kshs. 13,668 in lieu of leave

(c) Kshs. 18,719 being Arrear Salary in April 2015.

(d) Kshs. 23,759 being overtime worked for 21 days.

Total award – Kshs. 96,269.50.

(e) Interest at court rates from date of filing suit till payment in full.

(f) Costs of the suit.

Judgment Dated, Signed and delivered this 9th day of July, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Nyumba for Claimant.

Nyaberi and Company for Respondent.

Chrispo – Court Clerk