



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 110 OF 2016

(Before Hon. Justice Mathews N. Nduma)

PATRICK ODUOR OGORE.....CLAIMANT

VERSUS

MAYFAIR HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 10th May 2016 seeking:

- (i) One month salary in lieu of notice Kshs. 27,860.
- (ii) Kshs. 24,875, being leave allowance.
- (iii) Kshs. 445,710 being unpaid overtime hours to Kisii and Kendu Bay.
- (iv) Kshs. 80,550 being hours worked during public holidays and
- (v) Compensation for unlawful and unfair summary dismissal.

2. The suit was defended vide a memorandum of response filed on 20th June 2016 and the claimant filed a response to the memorandum of response on 15th July 2016 joining issues with the respondent.

3. The claimant testified under oath and adopted witness statement filed together with the memorandum of claim as his evidence in chief. CW1 told the court that he was employed as a driver by the respondent on 9th September 2013 at a salary of Kshs. 799 per day. That his salary increased as he continued to serve the respondent until 5th June 2015 when his employment was terminated on false allegations that he was filtering fuel. That the respondent made such false allegations consistently and deducted monies from his salary totaling Kshs. 28,031. That on one occasion the respondent deducted Kshs. 670 from claimant's salary in respect of used up spare parts due to wear and tear.

4. That the claimant was a union member and was covered by a collective bargaining Agreement between the respondent and Bakery, Confectionary, Food manufacturing and Allied workers union (Kenya).

5. That in terms of the CBA, he was entitled to one month's termination notice or payment in lieu of notice. That he was also entitled to 25 days annual leave with full pay. That he had not taken leave for two years at the time of termination. That the claimant was owed dues in the sum of Kshs. 578,995 at the time of termination.

6. That he was supposed to work 48 hours spread over 6 days but he worked more hours that were not paid. That he worked during weekends and holidays and was not paid. The claimant produced Appendix '2' showing the overtime worked but not paid. That he received a weekly pay of Kshs. 995 per day and an allowance of Kshs. 200 per day.

7. That the warnings given on fuel shortage were false and when he tried to explain to the director, he was sent away and not listened to. That his salary was cut unlawfully to pay alleged fuel shortage and whenever the motor vehicle had a breakdown. Claimant said it was not possible to siphon fuel from the van. That the dismissal for siphoning fuel was unlawful and unfairly. He was summarily dismissed without a disciplinary hearing or notice to show cause. That he was given a paper to sign so that he could be paid his final dues. That he signed the

paper under protest. He was only paid salary for the last week. That he had worked for two years. That he was not paid in lieu of notice.

8. CW1 pray to be awarded as claimed including costs and interest.

9. RW1 Abdul Majid Mohamed testified for the respondent. RW1 said that he worked as the Deputy General Manager of the respondent Bakery. That he knew the claimant. That he relied on his witness statement and list of documents dated 27th September 2016. RW1 testified that the claimant was summarily dismissed for siphoning diesel from the van he drove. That he was given warning letters and was eventually dismissed summarily. That claimant signed a letter in full and final settlement of all claims upon being paid his final dues.

10. That the suit be dismissed with costs. Under cross examination, RW1 stated that the vans had seals on the fuel tanks. That the seals were not broken. That fuel was siphoned from the van without breaking the seals. RW1 stated that this could be done if pipes are removed. That the evidence of this was excess use of fuel above the route average. That drivers had the same vehicles but claimant's fuel use average was higher. That claimant drove canter Registration No. KAV 996M. RW1 did not know the engine capacity of the van. RW1 said that the van was supposed to use one litre per 6.3 kilometres. RW1 did not have the monitoring record in court between 25th May to 2nd June 2015. RW1 did not have the claimant's fuel use report before court either. RW1 said the canter was about 9 years old. RW1 admitted some of the vans used by other drivers were new. RW1 said at times claimant drove other motor vehicles. RW1 said that respondent had never caught any driver red handed siphoning fuel from the vehicle engine. RW1 speculated that it was possible however. RW1 did not produce record of any disciplinary hearing before the summary dismissal of the claimant. RW1 testified that the claimant was paid Kshs. 895 per day since he was a casual. That he was only paid for days worked. That the claimant was surcharged for 25 litres of fuel at Kshs. 3,680. RW1 denied that the claimant received final payments under protest.

Determination

11. The issues for determination are:

- (i) Whether the summary dismissal of the claimant was for a valid reason and done in terms of a fair procedure.
- (ii) Whether the claimant is entitled to the reliefs sought.

Issue (i)

12. The testimony by CW1, the claimant is to the effect that he was falsely accused of siphoning fuel from the canter van he delivered bread with by the respondent without any proof. That he was on three different occasions falsely accused and surcharged money from his salary that he had siphoned fuel from the car. The testimony by RW1 was that, respondent had not caught any driver siphoning fuel from the bread delivery vans but suspicions were made when a motor vehicle consumed more fuel for the same distance than the average consumed by the other vans. RW1 admitted however under cross examination that the van driven by the claimant was 9 years old whereas others were new. RW1 also admitted that the claimant was surcharged to replace old parts from the said motor vehicle on allegations that the wear and tear resulted from bad driving.

13. RW1 admitted that the new vans consumed less fuel than the old one. RW1 also did not produce records of the fuel consumption the claimant was alleged to have siphoned.

14. The claimant was eventually summarily dismissed on allegations that he was continuing to steal fuel.

15. Clearly, the respondent had no evidence of fuel theft by the claimant. The claimant was summarily dismissed on mere suspicions that had no sound mechanical basis. The respondent did not produce any expert evidence to demonstrate that its suspicions were valid. The claimant was dismissed summarily without notice, notice to show cause and without prove that a disciplinary hearing took place before the dismissal. The dismissal of the claimant violated *Sections 36, 41, 43 and 45 of the Employment Act, 2007*. The case of **Nicholas Muasya Kyule vs FarmChem Limited, Industrial Cause No, 1992 of 2011 (2012) LLR 235(ICK)** supports the finding of this court that the respondent had no tangible basis to hold that the claimant had stolen fuel.

16. The summary dismissal of the claimant was unlawful and unfair and the claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*.

17. In this respect the claimant had worked for two years. The claimant was not given notice. The claimant did not contribute to the dismissal. The claimant was not paid any terminal benefits apart from a week's salary upon dismissal. The claimant lost good prospects of career development and continuous employment. The claimant suffered loss and damage. The court also relies on **ELRC Cause No. 213 of 2015 Daniel Kiplagat Kipeibut vs SMEP Deposit Taking Micro Finance Ltd** to find that the claimant is entitled to four (4) months salary in compensation for the unlawful dismissal in the sum of Kshs. (27,860x4) 111,440.

Issue ii

18. As to whether the claimant is entitled to other reliefs sought the court finds as follows:

Notice pay

19. Following the finding that the summary dismissal was unlawful and unfair, the court finds further that the claimant is entitled to one month's salary in lieu of notice in the sum of Kshs. 27,860 and awards accordingly.

Leave Pay

20. The claimant adduced uncontroverted testimony that he was entitled to 25 days leave a year and did not take leave for two years. The court awards the claimant Kshs. 55,720 in lieu of untaken leave days.

Overtime and Public holidays

21. The claims for overtime and public holidays were not sufficiently proved by the claimant. The same are dismissed for want of proof.

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

(a) Four (4) months compensation Kshs. 111,440.

(b) Notice pay Kshs. 27,860.

(c) In lieu of two years leave Kshs. 55,720.

Total award Kshs. 195,020

(d) Interest at court rates from date of judgment till payment in full.

(e) Costs of the suit.

Judgment Dated, Signed and delivered this 16th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Amondi and Company Advocates for claimant. (Mr. Achura)

Mr. Oriel for Respondent

Chrispo – Court Clerk