



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**CAUSE NO 320 OF 2017**

**MOSE MBAYISI ISABWA.....APPLICANT**

**VERSUS**

**MINI BAKERS (NAIROBI) LIMITED.....RESPONDENT**

**J U D G E M E N T**

1. The Claimant averred that he was employed by the respondent on 1<sup>st</sup> July, 2004 as a dough maker at a salary of Kshs. 385 per hour. This salary was increased to Kshs. 17,161 per month by the time of his termination. According to the Claimant's at the time of employment he was issued with an identification card and on 30<sup>th</sup> July, 2013 was issued with a letter of appointment after working for the respondent for 9 years. The Claimant further alleged that he worked for the respondent diligently without any warning until 27<sup>th</sup> December, 2014 when he was terminated on account of absenteeism from work. The particulars of the allegations were never availed to him.

2. The respondent on its part averred that the Claimant was its employee and was remunerated in accordance with the existing CBA for absconding work without lawful reason. The respondent further receiving his full salary in December, 2014 failed to clear the IOU and instead absconded duty from 29<sup>TH</sup> December after his normal day off. The respondent further stated that after informing the Claimant of a disciplinary sitting for his case which was to take place on 17<sup>th</sup> January, 2015, the committee sat on the said date but the Claimant failed to turn up for the hearing. The committee then discussed the Claimant's disappearance and working clause 6(b)(i) of the CBA as read with clause 13(b) terminate the Claimants' contract.

3. In his oral evidence the Claimant stated he was injured while at work and given sick off. He was asked why he was absent and wrote to the Manager explaining his absence. Prior to termination he was never issued with any notice and that during the period he missed he never went on leave. He denied asking for Kshs. 3,000/= as advance.

4. In cross-examination he stated that he was confirmed into employment in 2013 and that he got injured in October, 2014. It was his evidence that he could not remember resuming work and that he was stopped from working on 27<sup>th</sup> December, 2014.

5. In re-examination he stated that he took the sick sheets to his employer and retained copies.

6. The respondents' 1<sup>st</sup> witness Mr. Moses Oyaro stated that he worked for the respondent as an oral man. According to him, the Claimant was the respondents' employee and that he was never terminated. According to him the Claimant deserted duties. He further stated that he was the shop steward and that the Claimant was terminated for absenteeism.

7. In cross-examination he stated that the Claimant was advanced Kshs. 3,000/= and that if one does not pay back money advanced it would be deducted from one's salary. It was his evidence that there was disciplinary hearing but the Claimant refused to sign for it. He further stated that the clerk was the one who used to prepare the must roll.

8. The respondent's second witness testified that he was the secretary to the disciplinary Committee and that he was the one who contacted the Claimant to come for the disciplinary hearing.

9. In cross-examination he stated that his work was to record the minutes of the disciplinary hearing. He further stated that he informed the Claimant that if he did not resume duties a disciplinary hearing would proceed.

10. On a claim for termination of employment on account of absconding duties, the burden is cast upon the employer to show that reasonable steps were taken to contact the employee and that he was informed either by a notice or other means to show cause why his service should not be terminated on account of absconding duties. Failure to do so would lead to a finding that the termination was unfair.

11. According to the respondent, the Claimant was informed by the Mr. Boniface Osilimong that if he did not resume duties a disciplinary hearing would be held at his service would be terminated. The respondent attached what they claim were minutes of the hearing to discuss the Claimants absence and eventual recommendation to dismiss the Claimant.

12. The Court notes that whereas the disciplinary hearing was documented, no notice to show cause or invitation to a disciplinary hearing was produced by the respondent. Further Mr. Osilimong who stated that he lived nearby the Claimant did not tell why he did not serve the Claimant with a written notice to show cause yet as secretary to the disciplinary hearing he took written minutes.

13. According to the Claimant he got injured in the course of his employment and was on sick-off the time he was accused of absconding duties. The respondent acknowledged the fact that the Claimant was injured in the course of his work. The respondent however never had any evidence to show any attempt was made to find out if the Claimant had fully recovered but refused to resume work.

14. From the foregoing the Court reaches the conclusion that the respondent failed to discharge the burden of proof cast upon them by law leading to a finding that the Claimant's termination was unfair. The Court therefore in the foregoing circumstances awards the Claimant's as follows: -

(a) Three months' salary in lieu of notice                      27,159

(per letter of appointment)

(b) Six months' salary as compensation for                      54,318

Unfair dismissal.    81,477

(c Costs of the suit.

15. Items (a) and (b) shall attract interest at Court rates from the date of judgment until payment in full but subject to taxes and statutory deductions.

16. It is so ordered.

**Dated at Eldoret this 3<sup>rd</sup> day of October 2019**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 3<sup>rd</sup> day of October 2019**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of: -**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**