



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2221 OF 2015**

**JUSTUS KELI MAKAU.....CLAIMANT**

**VERSUS**

**TUSKER MATTRESSES LIMITED.....RESPONDENT**

**JUDGMENT**

1. Justus Keli Makau (Claimant) was employed by Tusker Mattresses Ltd (Respondent) on 1 January 2012 as a Shop Assistant. On 14 October 2013, the Respondent promoted him to Cashier.
2. Come 9 December 2014, the Respondent issued a *show-cause notice* to the Claimant to explain why disciplinary action should not be taken against him for negligent performance of duty (the Claimant was also suspended for 2 weeks on half pay).
3. The particulars were that the Claimant had failed to charge a customer for sale of 10 litres of cooking oil.
4. The Claimant responded to the *show cause* on 11 December 2014, and on 23 December 2014, he was invited to attend an oral hearing on 5 February 2015.
5. The Claimant attended the hearing where he also presented another written defence. He was accompanied by a shop steward.
6. On 9 February 2015, the Respondent dismissed the Claimant from employment.
7. The Kenya Union of Commercial, Food & Allied Workers, of which the Claimant was a member then reported a trade dispute to the Cabinet Secretary for Labour and a conciliator was appointed.
8. Attempts at conciliation failed and on 21 September 2015, the Conciliator issued a *Certificate of Unresolved Dispute*, prompting the filing of this dispute in Court on 15 December 2015 by the Kenya Union of Commercial, Food & Allied Workers.
9. The Respondent filed a *Response* on 3 November 2016 and the Cause was heard on 22 October 2019. The Claimant testified while the Respondent opted to close its case without leading any evidence.
10. The Claimant filed his submissions on 5 November 2019 while the Respondent filed its submissions on 22 November 2019.
11. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

***Procedural fairness***

12. The Claimant was served with a *show-cause* setting out the allegations to confront and he responded in writing.
13. The Respondent thereafter invited the Claimant to an oral hearing and he attended accompanied by a shop steward.
14. The Court, therefore, finds that the termination of the Claimant's employment met the statutory threshold outlined in sections 35(1) and 41 of the Employment Act, 2007 and was procedurally fair.

### ***Substantive fairness***

15. Pursuant to sections 43 and 45 of the Employment Act, 2007, the Respondent was under an obligation not only to prove the reason(s) for terminating the Claimant's employment but that the reasons were valid and fair.

16. The Claimant denied in his testimony under oath that he failed to charge for the cooking oil, and explained that he could not see the cooking oil (in the trolley) from where he was sitting and that a packer packed the oil without reference to him.

17. The Respondent did not present or lead any evidence to disprove the narration by the Claimant, and the Court has no hesitation in concluding that there were no valid and fair reasons to terminate the Claimant's employment.

### **Appropriate remedies**

#### ***Compensation***

18. The Claimant served the Respondent for about 3 years and in consideration of the length of service, the Court is of the view that the equivalent of 2 months gross wages as compensation would be fair (last gross wage was Kshs 35,917/-).

#### ***Pay in lieu of notice***

19. Considering the conclusion that the termination of the Claimant's employment was substantively unfair, the Court will award the equivalent of 1-month salary as pay in lieu of notice.

#### ***Wages for February 2015***

20. The Claimant sought Kshs 10,775/- on account of wages for February 2015.

21. The Respondent offered him Kshs 3,454/- and the Court will allow the offer by the Respondent.

#### ***Service gratuity***

22. The Claimant sought Kshs 71,834/- as *service gratuity*.

23. The contract at clause 9 provided that the Claimant was eligible for enrolment into a pension scheme. No evidence was led as to whether the Claimant joined the pension scheme.

24. However, the copy of payslip produced by the Claimant shows that he was a contributor to the *National Social Security Fund*.

25. The Respondent had nevertheless offered the Claimant Kshs 65,555/- on account of *service pay* and the Court will award *service pay* as offered.

#### ***Withheld salary during the suspension***

26. The Claimant was suspended on half-pay and had his contract ultimately terminated.

27. The Court has found the termination of employment substantively unfair, and in the circumstances finds that he is entitled to the withheld salary computed as Kshs 35,917/-.

#### ***Leave***

28. The Respondent had further offered the Claimant Kshs 2,185/- accrued leave and the Court awards the same.

### **Conclusion and Orders**

29. The Court finds and declares that although the Respondent complied with the requirements of procedural fairness, the reasons for termination of the Claimant's employment were not proved as valid or fair and awards him

(a) Compensation Kshs 71,834/-

(b) Pay in lieu of notice Kshs 28,403/-

(c) Wages for February 2015 Kshs 3,454/-

(d) Withheld salaries Kshs 35,917/-

(e) Service pay Kshs 65,555/-

(f) Leave Kshs 2,185/-

TOTAL **Kshs 207,348/-**

30. The Claimant is denied costs for failing to serve submissions upon the Respondent.

**Delivered, dated and signed in Nairobi on this 29<sup>th</sup> day of November 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Nyumba, Industrial Relations Officer, Kenya Union of Commercial, Food & Allied Workers

For Respondent Mr. Kanchory instructed by Kanchory & Co. Advocates

Court Assistant Lindsey