



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 216 OF 2017**

**TIMOTHY MWANGI MURIU .....CLAIMANT**

**VERSUS**

**CENTRAL KENYA COFFEE MILLS LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for unfair termination from employment, non-payment of salary and terminal benefits. The Claimant averred that he was employed by the Respondent as a Field Demonstration Officer in 2007 for earning a daily wage of Kshs. 200/-. He averred that he continued working faithfully and diligently and as a result was offered a contract in 2011 and his salary increased to Kshs. 10,000/- a month. The Claimant averred that he received a letter from the Respondent on 21<sup>st</sup> September 2015 accusing him of gross misconduct and effectively terminated his employment without pay for that month and his terminal benefits. The Claimant averred that the Respondent instigated his arrest and subsequent prosecution at Karatina SPM's CR. Case No. 521 of 2015 for the offence of stealing by servant which charges were subsequently withdrawn for lack of evidence. The Claimant averred that the termination was procedurally unfair and substantively unjustified as he was not granted an opportunity to be heard and he never stole anything from his employer. He termed the termination as malicious, unlawful, bereft of human kindness, brutal and unfeeling. The Claimant thus prayed for judgment against the Respondent for damages for wrongful termination equivalent to 12 months' salary – Kshs. 120,000/-, service pay – Kshs. 10,000/-, salary for the month of September 2015 – Kshs. 10,000/-, one month's salary in lieu of notice – Kshs. 10,000/-, certificate of service and costs of the suit.

2. The Respondent filed a response to the memorandum of claim and averred that the dismissal was on account of gross misconduct. It averred that it had on reasonable and sufficient grounds suspected the Claimant of having committed a criminal offence thereby causing the Respondent substantial detriment. The Respondent averred that it reported the theft to the police and provided all relevant information it had to support its complaint. The Respondent averred that it notified the Claimant of the complaints against him, gave him an opportunity to explain himself and informed him of the reasons why he was dismissed. The Respondent averred that on 10<sup>th</sup> September 2015 the Claimant was involved in the theft of its property and the fact that the criminal charge against the Claimant was withdrawn does not disprove the reasonable suspicion that the Claimant committed a criminal offence against or to the detriment of the Respondent. The Respondent averred that it gave the Claimant an opportunity to explain himself on the charges on 18<sup>th</sup> September 2015 in compliance with the law and its human resource manual but he failed to satisfy the disciplinary committee that he was innocent. The Respondent averred that the dismissal letter clearly indicated the reason for dismissal. The Respondent averred that the law permits an employer to summarily dismiss an employee for gross misconduct and that for the foregoing reasons the Respondent thus prayed that the entire claim be dismissed with costs.

3. The Claimant testified as did the Respondent's witness Peter Mwaura Kimata. The Claimant testified that he was accused of theft and was arrested on Friday, 18<sup>th</sup> September 2015 and that he was released on cash bail on Saturday and arraigned at Karatina Law Courts on Monday charged with theft. He stated that however, the case was dismissed for lack of evidence. He testified that he was not called for a disciplinary meeting and as such he did not attend any meeting at the boardroom. He stated that there was a store where items were kept but the store man used to issue them with the items whenever need arose. The Claimant admitted to knowing one David Githinji and that David was given tasks of removing the items from one store to another but the items were not to be placed in a store where they kept items for his use. He stated that David Githinji was dismissed the day it was found that the items were missing. The Claimant testified that he was arrested but he did not know when the act took place. He also testified that he does not understand the grounds for summary dismissal and maintained that there should be a hearing.

4. The Respondent's witness Peter Mwaura Kimata the Deputy General Manager testified that the Respondent was undertaking repairs in two stores and items had to be transferred to another store. He stated that the administrator assigned one Mr. Githinji to move the items and that the store that was being emptied was adjacent to the one manned by the Claimant. He stated that the administrator upon checking realized that there were items that were missing, viz. two tyres and one helmet. He testified that the security officer was called, went to the store and found the carpenter who told them that as the items were being moved Githinji took 2 helmets and 1 helmet to the other store. In cross-examination he stated that the CCTV footage showed Githinji leaving the store with Timothy while Githinji was carrying out two bags and Timothy was following. He testified that one sack had a cylindrical object giving the impression that they were tyres. He stated that the Claimant had keys to the store and he was the one who opened it and that he was hesitant to say that Githinji stole without Timothy's involvement. He stated that the theft was from a store to which the Claimant had access. He stated that the Claimant continued working as investigations were carried but Githinji took off and left but when he was called he said that he would show them where he took the items. He confirmed that the Claimant was not shown to have carried the items as the carpenter who saw them said that the items were thrown to the store by Githinji but the Claimant allowed access. He testified that they had a disciplinary meeting in which Mr. Githinji did not attend but the Claimant was present. He stated that the meeting did not have a procedure of signing the minutes and that the meeting clearly showed the CCTV footage and evidence of the witnesses. He stated that the Claimant failed to exculpate himself and the meeting concluded that he be summarily dismissed as provided for by the Respondent's manual. He stated that they conducted a disciplinary meeting but upon being requested to show CCTV footage of the same, he said that they were not aware it would be requested for and as such they never downloaded it as they did on the date of the incident and therefore the footage was overwritten after 3 months. He stated that they paid the Claimant all his dues for the month he had worked. He confirmed to have verbally dismissed the Claimant the same day of the meeting after it was

concluded that he be dismissed and that he was only served with a dismissal letter on 21<sup>st</sup> September 2015.

5. The Claimant submitted that the Respondent had claimed that he was associated with missing items from the archive store and that the disciplinary procedures allow the Respondent to dismiss an employee on account of theft. The Claimant submitted that theft and being associated with missing items are two different things. He submitted that theft is a criminal offence that must be proved beyond reasonable doubt and mere suspicion however strong is not proof of theft. He submitted that investigations were carried out including review of CCTV cameras and the final verdict was that there was no evidence linking the Claimant with the theft. The Claimant maintained his innocence and submitted that the Respondent should have interdicted him as provided for under clause 14.4.5.1 of the Respondent's disciplinary procedures. The Claimant submitted that from all the statements recorded, it was clear that the Claimant did not know whether anything was being removed from the store. He submitted that he did not witness Githinji throw anything to the demonstration farm as he was not in the room where the items were kept. The Claimant submitted that he was not a security officer and he could not be expected to inspect the sack that Githinji was carrying. He stated that as per the statement of Ann Kariuki, the store in which Githinji allegedly threw the sack was accessible to all employees as they normally used it as a changing room. He submitted that it was the responsibility of security officers at the main gate to check and confirm if anyone left with any of the company's assets. The Claimant submitted that if at all he was entrusted with keys of the store, which he vehemently denied, he could have not denied a compound cleaner access to the room which they all used as a changing room. The Claimant submitted that he was not to blame for the loss of items and if there was anyone to blame it was Githinji who allegedly admitted to have stolen the items, Ann Kariuki who allowed him to remove things unsupervised or the security officers who failed to secure the room and who allowed Githinji to miraculously run away even after owing up to the theft. He submitted that undoubtedly, the security officers after going through the evidence arrived at the conclusion that there was no evidence linking the Claimant with the theft which explains why the Claimant was allowed to continue working for 6 days even after the discovery of the alleged theft. It was submitted that it is the same conclusion that the DPP arrived at when the matter was withdrawn. The Claimant submitted that all the Respondent needed was a scapegoat after the disappearance of Githinji and it had to be the Claimant. He submitted that Githinji's admission of theft is a confession of a person who conveniently disappeared which confession the Claimant was not accorded the opportunity to challenge. He submitted that it is also worth noting that all these statements despite being recorded before the disciplinary committee were never supplied to the Claimant either before or during the purported hearing. The Claimant denied being invited to a disciplinary hearing and submitted that the Respondent had produced alleged disciplinary committee proceedings that were in a reported speech. It was submitted that it is not clear from the proceedings on who said what as the testimony was not recorded verbatim. The Claimant submitted that the supposed attendees including the Claimant did not sign anywhere to show that they attended. He submitted that it was incumbent for the Respondent to adduce corroborating evidence that the meeting took place as alleged. The Claimant submitted that no reasons were advanced as to why such material witnesses who even allegedly witnessed the alleged theft were not called. He submitted that despite the area where the meeting took place having CCTV cameras the Respondent was at pains to explain why no such CCTV footage was produced as evidence. The Claimant submitted that the Respondent confirmed that he did not serve the Claimant with any notice or invitation letter for the supposed meeting. The Claimant submitted that he was never informed of his right to have an employee of his choice present and there is nothing to show that he was given an opportunity to cross-examine his accusers. He urged the court to find that the meeting never happened. He submitted that interestingly the termination letter did not refer to this supposed disciplinary meeting. The Claimant urged the court to award him 12 month's salary as compensation owing to the fact that by parading the Claimant as a criminal it rendered it almost impossible for him to secure any other employment. He submitted that the termination was unfair and urged the court to grant the orders as prayed.

6. The Respondent relied on Section 44 of the Employment Act and submitted that an employer has a right to summarily dismiss an employee for gross misconduct. It submitted that the procedure for summary dismissal has been provided for under Section 41 and 43 of the Employment Act which provides for fair procedure and proof of reason for termination respectively. The Respondent submitted that the Claimant was an accomplice to the theft of the missing items. It relied on the case of **Kenya Power & Lighting Company v Aggrey Lukorito Wasike [2017] eKLR** where the Court of Appeal considered the standard of proof that an employer needs to satisfy where there is an act of criminality alleged on the part of the employee. The Court stated "*that the standard of proof is lesser than that of balance of probabilities. In the Avril Elizabeth case (supra), the court held that video showing an employee talking to a person who was stealing the employer's goods was found to have been sufficient to prove on a balance of probabilities that the employee was an accomplice to the theft.*" The Respondent submitted that the Claimant being the sole custodian of the keys to the store room and relying on the information that the carpenter gave the Respondent, the Claimant was involved in the theft by assisting his colleague steal the items. The Respondent submitted that this was also revealed by the CCTV footage which was enough proof that the Respondent had valid reasons to dismiss. The Respondent submitted that it adhered to Section 41 of the Employment Act by organizing a disciplinary committee where the Claimant was invited to tell his side of the story as evidenced by the minutes of the disciplinary meeting held on 18<sup>th</sup> September 2015 and the letter communicating the committee's resolution sent to the Claimant on 21<sup>st</sup> September 2015. The Respondent submitted that in view of the foregoing, the termination was procedurally fair as the Claimant was accorded adequate opportunity to appear and defend himself and notified of the committee's decision. The Respondent submitted that the reasons for dismissal were also communicated vide the same letter. The Respondent submitted that the Claimant is not entitled to the reliefs sought and his case should be dismissed with costs.

7. The Claimant was dismissed on suspicion of having participated in theft at the Respondent's premises. The Respondent produced evidence that showed the Claimant and the suspect walking to the demonstration farm with the latter carrying a sack. From the material before me it is evident the Respondent had reasons to suspect the Claimant as it did. The Respondent maintains it accorded the Claimant the safeguards under Section 41. It availed some record of a meeting at which the Claimant attended though he denied doing so since there was no attendance list and signature availed as proof of attendance. The Claimant was actually charged in a court of law though he was discharged. The Claimant therefore was not a paragon of virtue as he asserts and could have been dismissed as he was. The law provides under Section 43 of the Employment Act that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45(2). The Section provides further that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. There were no doubt reasons for dismissal and the Claimant was heard and accordingly dismissed in accordance with the law. The claim is dismissed but with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 20<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**