

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 179 OF 2018

KENYA UNION OF COMMERCIAL

FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

JATOMY ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent seeking recompense for the alleged unfair and unlawful dismissal of the Grievant Salesio Muriithi Ngari a shop assistant. The Claimant averred that the Grievant worked for the Respondent and earned Kshs. 3,600/- as a shop assistant before he was promoted to position of salesman in 2010 and salary increased to Kshs. 9,000/- and further to Kshs. 10,000/-. The Claimant averred that the Respondent never deducted NSSF until 2009 when it deducted and remitted the dues. The Claimant averred that the Grievant was earning Kshs. 15,000/- plus 15% basic as house allowance at the time of dismissal in July 2015. The Claimant averred the genesis of the dispute was the requirement for staff to sign contracts and offered to pay the Grievant Kshs. 58,000/- for his past services. He declined to sign and in June 2015 he was issued a show cause letter for coming late and in July 2015 was suspended for the loss of Kshs. 20,686/-. The Claimant averred that the Grievant gave an explanation to the Respondent but was summarily dismissed on 16th July 2015. The Claimant averred that it reported the existence of a trade dispute to the Cabinet Secretary for Labour who appointed a conciliator and the parties did not agree prompting the issuance of a referral certificate to Court. The Claimant submitted that the Grievant's fate was sealed when he failed to sign the contract forms. The Claimant thus sought the payment of house allowance, public holidays, overtime and leave as well as costs of the suit.

2. The Respondent filed a defence in which it averred that the Grievant was employed on 19th May 2006 and worked with the Respondent until 31st May 2013 when the Respondent was directed after a labour inspection to issue the employees with contracts of service. The Respondent averred that the Grievant refused to sign his contract but after conciliation was appointed to the position of sales clerk a position he held till 16th July 2015 when he was summarily dismissed. The Respondent averred that the Grievant was required to perform his duties with the outmost ability but failed to remit money collected from the Respondent's customers amounting to Kshs. 20,686/-. The Respondent averred that the Grievant did not report this until the accounts were being reconciled that the sum was noted to be unaccounted for. The Respondent averred that the Grievant was asked to show cause for the shortfall and his explanation was found unsatisfactory. The Grievant was required to pay all outstanding shortfalls and he failed to prompting the Respondent to summarily dismiss the Grievant. The Respondent averred that the Claimant reported a dispute and after conciliation no agreement was reached. The Respondent averred that the Grievant's terminal dues were computed and the cheque deposited with the County Labour Office in Embu alongside his certificate of service but he declined to collect them. The Respondent submitted that the Grievant was not entitled to notice as he was summarily dismissed and he was not declared redundant hence not entitled to severance pay (gratuity). The Respondent averred that the claims for unpaid dues in 2006 to June 2009 were time barred. The Respondent averred that the dismissal of the Grievant was in accordance with Section 45 of the Employment Act and that his dismissal was in accord with fair procedure as he was asked to give an explanation and the same found unsatisfactory. The Respondent averred that the dismissal of the Grievant was lawful and the suit should be dismissed with costs to the Respondent.

3. The Grievant and the HR manager of the Respondent testified. The Grievant testified that he was undertaking his duties at Kitiri Market where a customer paid him Kshs. 21,000/- and that because he was given cash he dropped the cash in error and found about the shortage the next day. He stated that he sought to have the issue and that he was the one who discovered the loss and notified the Respondent about it. The Grievant testified that he explained to his employer what had happened and was told to continue to work. He stated that he was suspended after 2 days. He stated that the notice to show cause was served and he offered to make payment of the difference in instalments of Kshs. 5,000/- a month. The Grievant testified that it was after the reply that he got a summary dismissal. He said that he was not called for a disciplinary hearing nor was he heard. He stated that he had worked public holidays and never went on leave. He thus sought the dues as per his claim. He was cross-examined and he testified that he was asked to give an explanation and he did. The Grievant stated that the money was to be deducted from his pay and after his dismissal the matter went to conciliation where the Respondent offered him Kshs. 21,000/- which he did not accept. In re-exam he stated that he reported the theft of the case and that he informed the boss after they did the final analysis. He denied payment of his dues was made at the Labour Office.

4. The Respondent called its witness Dennis Mugendi Njeru who testified that the Grievant was a salesman who would deliver goods and invoices and collect the proceeds. He stated that an accounts clerk, Bosco Munywoki, now deceased is the one who found there was a shortfall 3 days after the sales proceeds were received. He stated that the Grievant was required to notify the office of the anomaly. He testified that it was the accountant who raised the issue. He said that the Grievant was not remorseful and that the Respondent first gave him an option to settle the funds lost but he did not give a counterproposal. He stated that the matter was reported to Labour Office and the Respondent deducted the sum lost from the sum paid by cheque at the Labour Office and presented the certificate of service. In cross-examination he testified that they were notified of the loss 3 days later and that the Grievant was suspended. He stated that there was a disciplinary meeting. He stated that the Grievant declined to sign the contract forms after the labour inspection but the others signed and were paid. He stated that the Grievant did not receive the payment due. He testified that the sum paid at the Labour Office were the Grievant's

terminal dues. He was re-examined and stated that the Grievant was dismissed sometime in July 2015 and filed suit in May 2018. That marked the end of oral testimony and the parties were to file written submissions.

5. The Claimant submitted that the Grievant was not a fair hearing and that his dismissal was thus unlawful and unfair. It was submitted that the Grievant was not accorded leave in the years 2006-2012 as required under Section 12 of the Employment Act. The Claimant submitted that the provisions of Section 41 of the Employment Act and Article 50 of the Constitution were breached in the denial to a fair hearing. The Claimant submitted that the Grievant worked overtime and was not paid for the 2½ hours extra worked each day. The Claimant submitted that the Grievant was underpaid as per the Wages General Order for 2015. The Claimant thus submitted that the Grievant was entitled to one month's salary in lieu of notice – Kshs. 19,879.90, service gratuity – Kshs. 25,930.35, public holiday – Kshs. 51,860.70, overtime – Kshs. 874,800/-, accrued annual leave 2006 to 2013 – Kshs. 60,205.80, underpayment of wages Kshs. 381,946.20.

6. The Respondent submitted that the Grievant's complaint was presented on 3rd May 2018 whereas the complaint in terms of Section 71(2) of the Employment Act required the Claimant/Grievant to file a suit within 3 months. The Respondent submitted that the Court had the discretion to extend the time to file in cases where it was not reasonably practical for the complaint to be lodged before the end of the 3 months period. The Respondent submitted that the Claimant had not demonstrated the justification for filing late nor was there any explanation offered for the late filing. The Respondent submitted that the suit was incompetent and fatally defective and thus void *ab initio*. The Respondent submitted that Claimant failed to attach the minutes of the conciliation meeting in terms of Rule 5(1)(b)(i) of the Court Procedure Rules. The Respondent relied on the case of **Janet Mwocha Mwaboli v Modern Soap Factory Limited [2018] eKLR** where the learned judge (Rika J.) held that where a complaint is made under Section 47(3) of the Employment Act, the procedure in processing the complaint is as prescribed under Section 71 of the Employment Act in that the suit must be filed within 3 months and the suit must be accompanied by minutes of the conciliation and the conciliator's referral certificate. The Respondent submitted that the Claimant was not entitled to the relief sought for the Grievant. The Respondent placed reliance on the case of **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Technical University of Kenya [2019] eKLR** in which it was held that the claim had not been proved to the required standard as there was no evidence that the Claimant was entitled to the remedies sought for the grievants. The Respondent submitted that per the decision of **G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR** unpaid terminal dues do not constitute a continuing injury as contemplated under the proviso to Section 90 of the Employment Act and that the claims were to be made within 12 months of the month next after the cessation thereof. The Respondent submitted that the claims by the Claimant on behalf of the Grievant were time barred. The Respondent submitted that equity aids the vigilant and not the indolent and the Grievant being guilty of laches was not entitled to the relief sought.

7. The dispute came to Court after conciliation. The conciliation process was initiated by the Claimant on behalf of the Grievant. In his claim, he seeks recompense for the alleged breach of his labour rights and the non-payment of terminal dues. The Claimant filed the suit on 3rd May 2018 pursuant to the conciliation that was initiated on 19th October 2015. A conciliator was appointed on 12th November 2015 being Mrs. Kiruki of the Embu Labour Office but her appointment was rescinded on 22nd February 2016 when Mrs. L. W. Mburu was appointed conciliator instead. The Conciliator invited parties to a meeting on 6th April 2016 and the parties were to attend the joint meeting scheduled for 13th April 2016 at 10.00am. There is no indication as to what transpired at the meeting or whether a meeting did in fact take place. Another meeting was called for on 7th June 2016 and the meeting was scheduled for a date past which was 26th May 2016 per the letter reference ML/EBU/DISP/1045/2016 HQRS/MLSS/LD/IR/2/167/205. There is also no indication as to what happened after the letter. The referral certificate is dated 29th June 2016. Through it, the Conciliator indicates the dispute as the dismissal of the Grievant Salesio Muriithi Njagi employed in 2006 until 22nd July 2013 for the alleged loss of Kshs. 20,686/- and the claim by the Union for NSSF/NHIF unpaid until July 2006; and no leave, house allowance, public holidays, overtime and underpayment of wages. In the recommendation, the Conciliator recommended the payment of leave – 3 years, public holidays – 3 years, underpayment for 3 years and overtime for 12 months. The Conciliator noted that the FKE and the Conciliator were ready to sign the above agreed issues but the Union refused to sign. No minutes of the Conciliation meetings were attached as required under Rule 5 of the Employment and Labour Relations Court (Procedure) Rules 2016. In the dispute before me, the Claimant seeks exactly the same dues as enumerated before the Conciliator. The dispute was filed 3 years after the referral certificate was issued. The Respondent deposited the cash it maintained was due to the Grievant on 2nd June 2018 vide a cheque dated 20th March 2018 as well as the Certificate of Service dated 19th March 2018. It would seem both parties were less than candid in their approach as the Respondent waited until the suit was filed to make the deposit and issue a certificate of service. The Grievant and the Claimant also awaited the lapse of close to exactly 3 years before filing the suit. In terms of the Labour Relations Act and the Rules of this Court, there was no explanation advanced for the delayed filing of the claim. In any event, the conciliation minutes were omitted which renders the dispute moot. There is nothing for the court to do other than order the Claimant to facilitate the collection of the dues deposited by the Respondent to the Labour Office as well as the certificate of service issued. As the cheque is not good for payment any more the Respondent is to furnish the Grievant with a cheque for the dues the Grievant was entitled to per the conciliation process being the payment of leave – 3 years, public holidays – 3 years, underpayment for 3 years and overtime for 12 months. A computation of the dues to be filed within 14 days together with proof of payment as required. Since the dispute ought not have reached the courts, no costs are awarded.

It is so ordered.

Dated and delivered at Nyeri this 4th day of November 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar