



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**CAUSE NO. 18 OF 2018**

**STANLEY MBAABU.....CLAIMANT**

**VERSUS**

**MERU CENTRAL COFFEE CO-OPERATIVE UNION LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for his alleged wrongful termination from employment. The Claimant averred that he was employed as a watchman in 2004 and that at the time he earned Kshs. 4,800/- which rose to Kshs. 12,000/- as at the time of dismissal. He averred that on 5<sup>th</sup> March 2017 he was alleged to have been found with two keg cans belonging to a tenant of the Respondent, a fact which was not proved nor was he given a chance to defend himself or a fair hearing but instead the Respondent terminated the services of the Claimant without following the correct procedure. The Claimant averred that he suffered irreparable loss as the Respondent failed to pay his gratuity, unpaid leave, one month's salary in lieu of notice and overtime. He thus sought general damages for wrongful termination, gratuity for 14 years worked, unpaid leave and overtime, unremitted National Social Security Fund contributions, one month's salary in lieu of notice, any other relief the court may grant as well as costs and interest of the suit. To his claim he attached a letter from the Respondent seeking a return of union property in his possession, NSSF statement for the years 2009 to 2017, the demand letter from his advocate and the reply to the demand letter from the Respondent's advocates. The Claimant also attached a further list of documents comprising of the letter of 5<sup>th</sup> March 2017 to the County Labour Officer Imenti North detailing the action taken on the Claimant, to wit, dismissal for the offence he had committed.

2. The Respondent filed a statement of defence in which it denied that it dismissed the Claimant in March 2017. It averred that the Claimant was arrested in March 2017 and detained in Police custody when he allegedly paid for the stolen cans to secure his release from Police cells and he was relieved of his duties pending his furnishing the Respondent with a Police clearance detailing the circumstances of his arrest while on duty to pave way for further decisions regarding his employment with the Respondent. The Respondent averred that the Claimant deserted duty never to return and to date the Respondent awaits the Police clearance to enable it make a decision one way or another regarding the Claimant's employment. The Respondent averred that failure to furnish the clearance was failure to obey a lawful command or instruction from the employer which was grounds for summary dismissal as is the desertion of work. The Respondent denied that it was not liable to the Claimant for the loss and damages alleged in the claim. The Respondent thus sought the dismissal of the suit with costs. To the defence was attached the investigation diary containing the complaint, arrest and release of the Claimant. It also attached the letter of 3<sup>rd</sup> March 2017 seeking return of union property pending the Police clearance.

3. The Claimant and the 4 witnesses for the Respondent – Martin Muriira Ndegwa the Respondent's tenant, Jackline Gatwiri Gikundi a businesswoman and complainant, Lilian Nkuene Muthamia the HR manager of the Respondent and Paul Murithi Mutwoki a guard testified. The Claimant testified that he was dismissed without following due process. He stated that the Respondent failed to remit his NSSF dues in some months. He testified that he was unable to submit the clearance as the investigation was still ongoing. He conceded that he received the letter requesting for the return of union property. He stated that he went to the Labour Office and that is where he received the letter from the Respondent addressed to the Labour Officer informing him of the dismissal of the Claimant. He testified that he was arrested and no exhibits were found on him and he was released without charge. He stated that he was not granted a hearing by the Respondent. He said that only the 4 days worked in March 2017 were paid and he did not get his benefits. He was cross-examined and stated that the only item he had was the long jacket which was left at his workplace, the Respondent's premises, and therefore he had nothing to hand over. He testified that the case was pending and he confirmed he never wrote to advise that he did not have any items for the Respondent. He stated that he was working during the day and that the keg cans were in the keg depot in the Respondent's compound. He denied that he paid for the cans. He testified that he never went for clearance as the Officer Commanding Station (OCS) had told him to wait. He stated that the letter of 5<sup>th</sup> March 2017 by the Respondent indicated that he had been dismissed and he conceded that if one stole it would be in order for a dismissal to ensue. He wondered why the Respondent never sat with him on a disciplinary case as the Respondent never sought to find out. He stated that they took the witnesses accusations and accepted that as the truth. In re-examination he testified that he did not seek clearance as he was terminated.

4. The Respondent's first witness was Martin Muriira Ndegwa who testified that he was a mechanic and that he had rented the premises from the Respondent. He stated that he was resting in his car on 4<sup>th</sup> March 2017 and he saw the Claimant take 2 keg cans and pass near where he

was seated in the car and hurriedly placed them in the house used as a watchman's station within the compound. He stated the cans seemed empty due to the ease with which the Claimant carried them. He stated that a lady came later talking on the phone and looking distraught. He overheard the conversation and learnt she was speaking of some keg cans she had left in the compound which were missing. He stated that the lady approached the Claimant to enquire about the cans but the Claimant was uncooperative and even threatened to beat her. He stated further that a gentleman now deceased, by the name Mwiti went to the lady and confirmed that the Claimant had taken the cans and the lady begun calling someone on phone and the Claimant took advantage of that moment to leave and switched off his phone. He stated that at 5.00pm the night watchman came to relieve the Claimant and he opened the guard house one keg can was found in the house. He stated that on Monday 6<sup>th</sup> March 2017 he learnt the Claimant had been arrested on 5<sup>th</sup> March 2017 but was released and learnt later that he had negotiated and paid for the lost cans and the complaint was withdrawn. He was cross-examined and he stated that he saw the Claimant take 2 cans and he did not know who the owner of the keg cans was. He testified that he did not see Jackline bring the keg cans and that he was told about the arrest of the Claimant. The second witness for the defence was Jackline Gatwiri who testified that she was operating a bar in Meru town and used the Respondent's premises as a godown. She stated that she was the one who complained about lost keg cans and the Claimant was arrested and he paid her for the lost keg cans and one keg can was recovered. She stated that if the Claimant was not in the wrong he should not have paid her but go to court if he did not steal from her. She was cross-examined and stated that she had left 4 cans with the late Mwiti and that the Claimant accepted the loss and sent his wife to pay her for the lost cans. She stated that the Claimant was seen taking the cans. She testified that the Claimant paid for the missing cans at the Police Station and that was why he was released. She stated that the wife came with the money and the Claimant gave her the money. She stated he did not give her the money personally. She stated that the Occurrence Book did not indicate she was paid by the Claimant. She testified that she was not aware of the circumstances of the release as she was not the one who released the Claimant. In re-examination she stated that the Claimant was arrested on Sunday 5<sup>th</sup> March after the theft that took place on Saturday and the payment was made on Monday 6<sup>th</sup> March. She stated after she was paid she did not pursue the case further. The third witness for the defence was Paul Mirithi Mutwoki who testified that he was a watchman and colleague of the Claimant. He stated that the premises he guarded with the Claimant was used as a depot for keg beer. He stated that on the morning of 4<sup>th</sup> March 2017 he handed over the premises to the Claimant without any incident and went home. He stated that he reported to work at 5.00pm in the evening to relieve the Claimant and found people at the gate who informed him that the Claimant had disappeared when he was accused of stealing the keg cans. He stated that the people informed him that they had peeped into the guard house and could see a keg can and asked if he could open the room to see if there were other keg cans inside. He obliged and opened the room and found one keg can which he had not left there in the morning. He pleaded with them to allow him to retain the keg can in the house till the next morning when the Claimant would be back. They agreed and the next morning when the Claimant reported to work he found the lady and a man driving the car and as he left the lady went to report to the Police. He stated that he was called that afternoon by the supervisor Mr. Mworira and requested to return to work early as the Claimant had been arrested by the Police. He stated that he relieved the casual watchman the supervisor had asked to take care of the premises in absence of the Claimant. He stated that later in the week he heard that the Claimant and the complainant had resolved the matter out of court. He was cross-examined and stated that he did not question the Claimant about the cans. He stated that he was told 3 keg cans were missing. He stated that he opened the door where the keg can was found and he conceded he did not open it in the presence of the Claimant and the supervisor was also not present. The fourth witness for the Respondent was Lilian Nkuene Mugambi who testified that she was a HR manager of the Respondent and that she received a report of the arrest of the Claimant on 5<sup>th</sup> March 2017 while on duty at the godown where he worked as a watchman. She stated that he was arrested for the theft of 3 keg cans. She stated that she followed up and obtained the extract of OB entries related to the Claimant. She testified that she wrote to the Claimant requiring him to explain the circumstances of his arrest and he was given time off to pursue the matter and after engaging the Labour Office for conciliation did not respond to the request from the Respondent. She stated that he had not brought the clearance report sought to date. She testified that the Respondent had not yet terminated the services of the Claimant as there was no letter of termination of the Claimant. She testified that the disciplinary committee would address the Police report when available. She stated that the Claimant was entitled to leave allowance for 2015 and 2016 either way and that the Respondent had addressed the issued for the Claimant to clear to facilitate his payment. She was cross examined and she testified that she gave the Claimant a hearing and that they sat with the Claimant and conciliator severally. She stated that there was no letter written and they spoke with the Claimant. She testified that his services were not terminated. She was referred to the letter of 5<sup>th</sup> March 2017 by the Respondent and confirmed the letter addressed to the Labour Officer indicated that the Claimant was dismissed. She conceded the letter was not copied to him or even addressed to the Claimant. She stated that they did not terminate the Claimant's services and that the letter was miscommunication. She testified that the owner agreed to drop the charges after she was paid. She stated that there was no statement from the Police showing that he paid for the cans. She testified that the Claimant had not returned the union property and the Respondent was still waiting for clearance. In re-exam she stated that she did not know the circumstances under which the Claimant was arrested and charged. That marked the end of oral testimony.

5. The Claimant filed submissions and asserted that he was wrongfully terminated. He submitted that the Respondent confirmed dismissing him without a hearing. The Claimant submitted that even in case of gross misconduct the law was clear that there has to be a fair hearing before dismissal. The Claimant submitted that he was never charged with theft or the offence of stealing but was released pending further investigations by the Police. He submitted that the gist of his case was that he was dismissed without a hearing and that he had proved the same on a balance of probabilities.

6. The Respondent submitted that the Claimant was not dismissed but relieved of his duties to enable him clear with the Police and that the letter it sought from the Claimant was to ascertain the circumstance of his arrest while on duty so as to inform its decision as to whether any disciplinary action was to be taken against the Claimant. It submitted that the NSSF statement showed the dues were paid and therefore the Claimant was not entitled to gratuity as the law excludes employees under the scheme. The Respondent submitted that no evidence was led on any outstanding dues such as leave and overtime. The Respondent urged the dismissal of the suit with costs.

7. The Claimant's suit was on the premise that he was dismissed by the Respondent which dismissal the Respondent denied. However, the Respondent's letter to the County Labour Office dated 5<sup>th</sup> March 2017 clearly indicated that the Claimant was dismissed as the offence he had committed was a very serious one. The Claimant was to be paid leave allowance for 2015 and 2016 upon signing a release of claim and availing the Police clearance letter. He was not heard in terms of Section 41 and as such his dismissal was unlawful and unprocedural. There was no substantive fairness or procedural fairness as far as can be discerned. Whereas there was grounds for dismissal, the Respondent botched the termination by not hearing the Claimant as required in law before termination. He would therefore be entitled to:-

- i. One month's salary in lieu of notice – Kshs. 12,000/-,

ii. Unpaid leave allowance for 2015 and 2016 years

iii. Compensation limited to 3 months – Kshs. 24,000/-

iv. Costs of the suit strictly to scale

v. Interest at court rates shall run on the sums in i), ii) and iii) above from date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 4<sup>th</sup> day of December 2019**

**Nzioki wa Makau**

**JUDGE**