



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MALINDI**

**CAUSE NO. 712 OF 2015**

**YUSUF NGOME.....CLAIMANT**

**VERSUS**

**VITROCISSET KENYA (San Marco Project).....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 16.9.2016 alleging unfair termination of his employment by the respondent on 5.8.2013. He therefore prays for:

- (a) Declaration that he was wrongfully and unfairly terminated;
- (b) Three months' salary in lieu of notice being Kshs.63,825;
- (c) Kshs.127,650 being salary for the unexpired 6 months period of his contract
- (d) General damages for breach of contract

2. The Respondent has denied the alleged unfair termination and after due process he was dismissed from employment and paid all his rightful terminal dues.

3. On 10.5.2017, the matter came up for pretrial directions and the parties adopted the issues framed and signed by both of them on the same date. In a nutshell, the parties agreed that:

- (a) The employment relationship was not in dispute
- (b) All the documents filed by the parties as exhibits were not in dispute.
- (c) The written statements from each parties witnesses were adopted as evidence;
- (d) The parties to file written submissions to dispose of the suit.
- (e) The following issues were then framed for determination by the Court:
  - (i) Whether the Respondent had reason to terminate the Claimant;
  - (ii) Whether the Respondent followed due process prior to terminating the Claimant;
  - (iii) Whether the Claimant is entitled to the reliefs sought.

**Claimant's Case**

4. The Claimant stated that he was employed by the Respondent as a Gardener in 1996 at a monthly payment of Kshs.21,275. On 5.8.2013,

the Respondent terminated his services on allegation that he had attempted to steal a bottle of insecticide called Duduthrin. He denied the alleged offence and stated that he was using the chemical while in the course of his duty as a gardener at 2.00 p.m. He further contended that he was not supposed to leave work before 5.00 p.m. and as such, the allegation that possessing the insecticide at 2.00 p.m. was with intention to carry it away was false.

5. He further contended that his service for 16 years was unfairly terminated with any just cause and it was an embarrassment being called a thief. He therefore prayed the benefits and compensation sought in his suit.

### **Defence Case**

6. Mr. Maurizio Toninelli is the Respondent's Head of Administration. He stated that on 23.7.2015, he received a report from the Respondent's security officers that the Claimant had stolen a bottle of "Duduthrin" insecticide and he was caught sneaking it out of the Respondent's premises. Thereafter he served the Claimant with a show course letter which he duly responded to and he was invited to a disciplinary hearing on 1.8.2013. At the meeting the Claimant attended with his union officials but after the hearing, he was dismissed by the letter dated 5.8.2013. Thereafter the Claimant was paid Kshs.4,384 as his terminal dues and he signed a Discharge Voucher dated 30.8.2013 and 28.11.2013. He therefore urged that the Respondent had a reason for dismissing the Claimant and that she followed a fair procedure before the dismissal.

### **Analysis and Determination**

#### **Reason for termination**

7. The reason for the dismissal of the Claimant was theft of insecticide on 23.7.2013. He has denied the alleged theft and contended that he had the possession of the insecticide lawfully in the course of his duty as a gardener and he had no intention of stealing it. He further alleged that the time of the alleged offence was at 2.00 p.m. yet his time to leave work was 5.00 p.m.

8. The Respondent has not denied that the Claimant used to apply insecticides in the course of his duty she has also not called the security officer who caught the Claimant stealing the insecticide to rebut what the Claimant has alleged in his evidence.

9. However, after careful consideration of the documentary evidence which was admitted without any objection during pre-trial conference, it appears that the Claimant was caught with the insecticide in circumstance which entitled a reasonable employer to honestly believe or suspect that the Claimant possessed the insecticide with intention to steal. First in his reply to the show cause letter, the Claimant admitted that he was allocated the insecticide on 20.7.2013 and he did not use it but forgot it in the field and when he remembered it, the store was locked and he took it to his Changing Room. Secondly, on 23.7.2013, at 14.00 hours he decided to return the insecticide but while on the way his colleague asked him to assist in throwing rubbish and he allegedly put the bottle of insecticide in the pocket but was caught by the guards while going to throw the rubbish outside the main gate. Although the Claimant alleges that he intended to return the insecticide, I find that the employer was entitled, as he did, to construe the conduct of the Claimant as an attempted theft. If indeed he was innocent, he would have notified his boss that some insecticide was not used and return it the following morning and not to continue keeping it in his pocket and even attempt to walk out of the gate with it in the pocket. Consequently, I find that the Respondent has proved on absence of probability that she had a valid reason for dismissing the Claimant.

10. Under section 44(4) of the Employment Act, an employer is entitled to summarily dismiss his employees if:

*“(g) an employee commits or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”*

#### **Procedure followed**

11. Under section 41 of the Act, the employer is required in mandatory terms to accord his employee a hearing in the presence of another employee or union representative of his choice. In this case, the Respondent has produced proceedings of disciplinary hearing held on 1.8.2013 where the Claimant attended with his union officials. The said written proceedings were admitted as part of the documents during the pretrial hearing without any objection. I am therefore satisfied that the defence has proved on a balance of probability that she followed a fair procedure before dismissing the Claimant from service.

#### **Reliefs sought**

12. In view of the finding herein above that the Respondent had availed reason for dismissing the Claimant and that she followed a fair procedure before the dismissal, I decline to make declaration that the termination was wrongful and unfair as prayed.

13. Flowing from the foregoing findings, I dismiss the claim for salary in lieu of notice, salary for 6 months remaining in his Contract and General damages for lack of basis.

#### **Disposition**

14. The entire suit is dismissed with no order as to costs.

**Dated and signed at Nairobi this 23rd day of February, 2018**

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 2nd day of March, 2018**

**LINNET NDOLO**

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**JUDGE**