



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.238 OF 2016**

**WILLIAM ANYKA AMBOYE .....CLAIMANT**

**VERSUS**

**JAYKAY ENTERPRISES LTD ..... RESPONDENT**

**JUDGEMENT**

1. The claimant was employed by the respondent in June, 2000 as a Storekeeper; he was issued with a job card indicating his designation. After three years he was transferred to be a Turn Boy where he served until his termination of employment on 3<sup>rd</sup> August, 2014.
2. The claimant was earning a wage of Kshs.4, 500.00 per month which was increased over time to kshs.14, 600.00 per month. Work hours were 8am to 8pm for each week but were not paid overtime hours. All public holidays at work were not compensated.
3. The claimant travelled to Maralal on official duty on 2<sup>nd</sup> August, 2014 and upon return he was directed to the office to have his dues calculated. The claimant was then directed to surrender all work tools and was then paid his terminal dues and a Certificate of Payment was issued to him. this terminated his employment without notice, reasons or any hearing and which was contrary to the law.
4. The claimant is seeking to be paid for notice, work overtime, work during public holiday, leave due for 14 years, and compensation for unfair termination of employment.
5. The claimant testified in support of his claims. upon employment the claimant was a storekeeper and was then promoted to a turn boy but no written letters were issued to him. he would move in the respondent's lorry to deliver goods to various locations and customers working long hours from 8am to 8pm for seven days a week. He would only have a one hour lunch break. On 3<sup>rd</sup> August, 2014 the claimant had been at work but was called and [aid his terminal dues of Kshs.27, 627.00 without any explanation. The respondent alleged that there was no work to be undertaken.
6. The claimant also testified that he did not steal any sugar the property of the respondent. no such matter was brought to his attention during employment or before termination of employment. Where he stole there is no criminal charge made against him.

**Defence**

7. In response, the respondent has denied the employment back ground of the claimant as there is no proof and that the claimant joined the respondent first as a casual employee in November, 2006 and served intermittently at his own volition. When the claimant asked for off duty this was granted. There

was no work during public holidays of long hours.

8. The claimant was not dismissed from employment on 3<sup>rd</sup> August, 2014 as alleged as he accepted payment of his dues upon clearance and was issued with a pay slip for September, 2014.

9. On 1<sup>st</sup> January, 2014 the claimant signed an employment agreement with the respondent and under paragraph 6(b) thereof it was agreed that the employer had the right to give immediate notice before termination of employment for gross misconduct and where there was breach of the agreement. While the claimant was working at a turn boy, together with the driver they were diverting portions of sugar to themselves from the bags for transportation, thereby delivering to the customers less sugar than expected. These actions by the claimant were in breach of his employment agreement

10. The defence is also that upon such breach of agreement by gross misconduct the respondent has the right to dismiss the claimant summarily as he was engaging in fraud, dishonesty and brought the reputation of the company into disrepute with the customers. As the respondent was conducting investigations, the claimant deserted duty on 2<sup>nd</sup> October, 2014 and he continued to do so until his contract term expired on 31<sup>st</sup> December, 2014. Such contract was thus interrupted by default on the part of the claimant.

11. The defence is also that the claims made are not justified. The claimant did not attend work during public holidays or over time hours; the claimant was paid for all his leave days at 14 days and therefore not entitled to any other dues.

12. The respondent's witness was Nitin Kumar Hansraj the Managing Director of the respondent company and who testified that the claimant had been a security guard before joining the respondent in 2006 on casual terms. He then became a turn boy and was to ensure that all goods were loaded delivered to customers were recorded and in good condition.

13. The claimant would be at work from 8.30am to 6pm for 6 days in a week and the respondent was not open on Sundays. The claims for overtime work or work for 7 days in a week are without merit.

14. Mr Hansraj also testified that during public holidays the business was not open and where the claimant was required to work, he was paid. Such payments are noted in the pay slip.

15. The claimant was on a year contract.

16. The respondent had a regular customer who buys goods for them and he ordered sugar and a truck load was sent and the claimant loaded as the turn boy. Two hours later the sugar had not been delivered. The claimant and the driver had left the warehouse and to deliver the goods it would take about 20 minutes at most. The customer had not seen the truck. When the sugar was delivered, the customer found the bags suspicious and took weights and found to be less and the load was returned. The respondent lost this sale but more fundamentally the integrity and good will with customers. When the claimant was questioned he could not explain why it took him two hours to deliver and why the sugar was less in each bag.

17. Mr Hansraj also testified that for these reasons, the respondent could not renew the claimant's contract. He had a case of gross misconduct and could not keep an employee tampering with goods while delivering them.

18. The claimant was issued with pay slips and copy of his employment contract. The claimant's case was that of gross misconduct and contrary to his employment contract.

19. At the close of the hearing, both parties filed written submissions.

20. Taking into account the pleadings, the evidence of the parties and the written submissions, I note the provisions of section 10 of the Employment Act, 2007 and which requires an employer once a claim is

filed by the employee to submit the work records which the respondent failed to produce. However, both the claimant and the respondent's witness testified under oath and were both subjected to cross-examination.

21. The respondent's case that the claimant was under a one year contract was not challenged in any material way. This evidence on cross-examination was not controverted at all.

22. I take this was material to the entire case. That the claimant was on an annual contract of employment with the respondent running and ending in December, 2014. Such contract terminated on its terms when the claimant failed to attend work but was paid terminal dues on 2<sup>nd</sup> October, 2014.

23. With the defence thus not challenged the evidence by the claimant that on 3<sup>rd</sup> August, 2014 he was dismissed from employment lack material basis. Section 8 read together with section 9 and 10 of the Employment Act, 2007 allow for oral contracts of employment and which can be converted into writing. One the claimant was issued with an employment contract; such is permissible in law as a valid and legitimate mode of employment. In this regard, a fixed term contract must end on its terms as agreed by the parties.

24. On the claims that the claimant was in employment from 2000 and was not paid his dues therein until 2014 August, when he was dismissed. By application of section 10(1) and (3) (c) of the Employment Act, 2007 and which provides that;

*(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;*

25. The written contract issued to the claimant and covering the period of his employment with the respondent, apply in its terms. The failure by the respondent to abide the provisions of section 10(7) of the Act, the claims made by the employee under the term period of the contract must be taken at the correct position thereon.

26. Section 44(4) of the Employment Act, 2007 allow an employer to summarily dismiss an employee for gross misconduct. Section 44(3) also allow dismissal upon breach of the employment contract.

27. However, section 44 must be read together with section 41(2) of the Employment Act, 2007. The employee must be given a hearing, notice and the misconduct addressed. The notice required in this case may be less and based on the circumstances of each case.

28. In this case the evidence is that the claimant, while delivering well to a customer delayed and eventually delivered underweight goods and which the customer rejected. That this caused integrity and reputations damage to the respondent. the claimant in defence stated that he has never been charged with a criminal sanctions for any missing goods or for such misconduct. However, in employment relations, the administrative requirements for the employer to address work misconduct may not be similar to proceedings required for criminal cases. When the claimant tampered with goods in his care and meant for delivery to a customer of the respondent, then by application of section 44(4) of the Employment Act, 2007 the claimant acted carelessly and to the detriment of the employer. A defence that he was not charged in a criminal case cannot justify such conduct. To allow such conduct on the grounds that the respondent has not filed a complaint with the police would be to reward a gross misconduct.

29. The claimant testified that he was called to the office when he came back from the customer to deliver sugar. His dues were computed and paid to him. I take it before such action was taken he was questioned on his conduct.

30. In **Charles Mumo Nyumu versus Bollore Africa Transport & Logistics Kenya Limited, Cause No.1730 of 2014** the court in addressing the provisions of section 44(4) and 41(2) of the Employment Act, 2007 held that;

*Section 41(2) of the Employment Act, 2007 requires that gross misconduct be addressed within the context that the subject employee is given a hearing with short notice. The claimant was given several warnings to various acts of misconduct, he was issued with a show cause notice and to which he responded and was invited to a physical hearing and upon consideration, the respondent found him culpable and thus the termination of employment.*

31. In **Joseph Onyango Asere v Brookside Dairy Limited [2016] eKLR** the court held as follows;

*The Claimant confirmed that he was given a hearing as required under section 41(2) of the Employment Act. Though not documented, this is confirmed by the Claimant in his sworn evidence. As submitted in the case of **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** indeed internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably given a hearing to be able to give his defence.*

32. In this regard, the claimant cannot justify his misconduct where he was sent for work duties and tampered with the goods in his care. The resulting dismissal was justified.

33. On the remedies sought, the terminal dues paid to the claimant amounting to Kshs.27, 627.00 has no breakdown. The only evidence by the respondent's witness Mr Hansraj is that such include 14 days of leave due. this shall be taken into account with regard to dues owing.

24. On the claim for overtime under the subject period of 2014, the claim that there was such dues owing and that from 1<sup>st</sup> July, 2005 to 3<sup>rd</sup> August, 2014 and such amounting to kshs.776,270.80 is an exaggerated claim and covers work hours outside the period in question. Without a proper computation of what is due and arising from the period he claimant was under the annual contract and forming a separate work period from any other period, such claims must be rejected.

Claim for off duties for the subject period of annual contract is equally conflated under 8 years and for a period running 1<sup>st</sup> July, 2005 to 3<sup>rd</sup> August, 2014. I take it with abundance of caution that in the subject annual contract the claimant had 8 months at work with the respondent, these comprise 48 week and of which each Sunday the claimant was off duty. Such defence was not challenged. To claim for off duty in this regard would be without merit.

36. Work on public holidays is equally conflated under the same the band, 2005 to 2014 all being 88 days in total. For the subject period of 2014, the claimant has not given a rationale as to which public holidays are included in the cumulative figures of 88 days claimed. To award on this evidence would result in a miscarriage of justice.

37. Leave claimed for 14 years. As set out above, the respondent paid the claimant for 14 days leave as part of the dues admitted as having been received. Where the claimant was at work for 8 months, under section 28 of the Employment Act, 2007 he earned 21 days. Payment for 14 days thus covers his dues leave.

**Accordingly, save for what is set out above, the claims for unfair termination of employment must fail. Based on the assessments of the remedies claimed, nothing arise. Each party should pay own costs.**

Delivered in open court at Nakuru this 30<sup>th</sup> day of July, 2018.

**M. MBARU JUDGE**

In the presence of:

Court Assistants: Nancy & Martin

.....

.....