



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1967 OF 2013**

**ALEXANDER KIBERENGE ADERI.....CLAIMANT**

**VERSUS**

**DEVKAN ENTEPRISES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues plus compensation for wrongful and unfair termination of the claimant's contract of service by the respondent on 27.9.2013. It is the claimant's case that the termination was malicious and grounded on an invalid reason and without being accorded a fair hearing to defend himself. It is further claimant's case that during his employment, he never went for any leave and he was subjected to illegal salary deductions. He further averred that he was never a member a trade union.

2. The respondent admits dismissing the claimant on 27.9.2013 but avers that the dismissal was fair, legal and procedural and denied that it was done maliciously. She averred that the salary deductions against the claimant were lawful and not illegal as alleged by the claimant. She further averred that the claimant being a unionisable employee lacked capacity to sue in his own name without his trade union and as such, the court lacks jurisdiction to determine thus suit. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 22.2.2017 and 21.2.2018 when the claimant testified as Cw1 and M/s Loise Njeri, the respondent's HR Manager testified as Rw1 for the defence. Thereafter both parties filed written submissions which I have carefully considered herein.

**Claimant's Case**

4. The claimant testified that he was employed by the respondent in March 2012 as a Depanner. His duties involved receiving of already baked bread in the production chain. On 26.9.2013, he was in the right shift when the oven broke down for a few minutes leading to burning of one crate of loaves and on 27.9.2013, the Oven man took the burnt loaves and spoilt loaves to the stockman. On the same, 27.9.2013, he was served with dismissal letter for alleged damage of bread at the depanning section which was not true. He was then told by the HR Manager Mr. Peter Musembi to write an apology at the back of the dismissal letter so that he could get his job back and he did so. However, he was never given back his job. He therefore contended that he was not given fair hearing before dismissal.

5. The claimant denied any involvement in the spoiling of the loaves on 26.9.2013 as it happened in a different section from depanning. In addition, he contended that in the depanning section, they were working groups of 4 and as such one person could not take personal blame. He contended that spoiling of leaves is caused poor baking, poor mixing, and breakdown of oven but not by depanning staff.

6. He denied ever being a member of the union and even having received any advances and maintained that the salary deductions was subjected to was unlawful. He prayed for the unlawfully deducted money plus compensation for the unfair dismissal contending that he has since not served another job. He also contended that he had no disciplinary issue during his employment.

7. On cross examination Cw1 admitted that bread can get burnt by delay or breakdown of oven. He further admitted he was dismissed for burning loaves and he admitted the mistake in writing after the HR Manager told him to do so. He denied that he wrote the admission under threat. He stated that his salary was Kshs.15,034 but was subjected to deductions for the days not worked and for spoilt bread nicknamed advance. He claimed leave because he never went for any annual leave during his service.

### **Defence Case**

8. Rw1 admitted that the claimant was employed by the respondent as Depanner who work involved offloading leave of break from baking pans into the cooling trollies in readiness for slicing. In the production chain, the depanners work is groups of 3 and they are supposed to remove 120 loaves from the baking tins within 4 minutes and if one depanner delays on his part, the bread will be damaged.

9. Rw1 stated in her written statement that despite several verbal and oral warnings, the claimant repeatedly acted negligently by failing to turn bread in the oven leading to burning thereof and loss of the company. In her oral testimony she stated that on several occasions, the claimant delayed removing bread from the table after depanning and the supervisor reported the matter to the HR officer for action but because the company had a CBA with the union, she directed the HR officer to discuss the matter with the union and the claimant and he was given a chance to write his defence. That on 27.9.2013, the claimant admitted the negligence through a letter dated the same day before was dismissed.

10. Rw1 contended that after the HR officer who dealt with the matter left employment, she perused the company record and found that the claimant was rightfully dismissed because he was given an opportunity to defend himself and instead, he admitted the offence. She further contended that the offence committed warranted the dismissal of the claimant from employment. That although the claimant worked with 2 others in a group, the supervisor identified him as a culprit in the damaging of the bread.

11. Rw1 further stated that the claimant was a member of Bakery, Confectionary, manufacturing and Allied Workers Union which had a CBA with the respondent and as a legal requirement, union dues or Agency fees was being from all unionisable employees' salary at the rate of 5% of their salary. She contended that the company had been served with Agency certificate to deduct Agency fee from employees for benefiting from the CBA. She therefore maintained that the deductions from the claimant salary were lawful including union dues, NHIF, NSSF, PAYE, salary advance and miscellaneous deductions. She ended by stating that after the dismissal, all claimant's were calculated including accrued leave, days worked and severance pay but he never went to collect the same.

12. On cross examination, Rw1 admitted that the claimant never sought for salary advance and that item deducted as advances in his payslip was in fact bread taken on credit or damaged by the employee. She contended that the employee acknowledge the debit by signing the payslips without any complaint. On the issue of negligence, Rw1 admitted that she was not the claimant's immediate supervisor and she had no report from the supervisor detailing what happened on the material date. She however maintained that the claimant admitted the offence in writing at the back of the dismissal letter although she could not tell whether the admission was done in the presence of a union representative.

### **Analysis and Determination**

13. There is no dispute that the claimant was employed as a depanner by the respondent until 27.9.2013 when he was summarily dismissed. The issues for determination are:

- (a) Whether the dismissal was wrongful and unfair.

(b) Whether the reliefs sought should be granted.

### **Unfair termination**

14. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. Under section 43 of the Act, the reason for dismissal are those matters which the employer genuinely believed to exist at the time of the termination.

15. In this case the dismissal was on ground of negligent performance of duty by the claimant as per the dismissal letter dated 27.9.2013. The claimant admitted that he wrote an admission at the back of the letter after being promised by the HR Officer that he would get his job back. The said HR officer never testified to deny such promise. However, during cross examination, Cw1 admitted that he wrote the admission without any threat. Consequently, I find that the reason for the dismissal was valid because of the claimant's own admission in writing.

16. However as regards the procedure followed, it is clear from the chronology of events that the claimant was condemned unheard. The fact that he wrote his admission of the offence at the back page of the dismissal letter meant that he had already been dismissed before admitting the offence contrary to section 41 of the Employment Act. Under the said section, before terminating the employee on ground of misconduct, poor performance or physical incapacity, the employer is required in mandatory terms to first explain the reason to the employee in a language he understands, and in the presence of another employee or union representative of his choice, and thereafter invite the two to air their defence for consideration before the termination is decided. That express statutory procedure was ignored by the respondent in this case when the dismissal was written before according the claimant a hearing in the presence of another employee of union representative. Consequently I find and hold that dismissal of the claimant was unfair within the meaning of section 45 of the Employment Act.

### **Reliefs**

17. Under section 49 of the Act, I award him one month salary in lieu of notice plus 4 months salary compensation for unfair dismissal. The sum for the said items is Kshs.75,170. In granting the said compensation, I have considered the fact that the claimant contributed to his own dismissal through misconduct and also the fact that he had served the respondent for a fairly short period. The prayer for reinstatement is declined because three years have lapsed since the dismissal and under section 12 of the Employment and Labour Relations Court Act, reinstatement cannot be ordered after the lapse of 3 years from the date of dismissal.

18. The claim for damages of Kshs.3,247,344 which the claimant could have earned in 18 years before retirement age of 60 years is dismissed for lack of any contractual or legal basis salary is only paid for work done and there is no guarantee that employees must work upto the age of 60 years.

19. The claim for salary for 27 days worked in September is granted at Kshs.15,034. The claim for leave of 1 ½ is granted being  $Kshs.15,034 \times 31.5/26 = Kshs.18,214.25$ . However, the claim for severance pay is dismissed because the termination was not through redundancy.

20. The claim for unlawful deductions as salary advances is granted because although Rw1 alleged that it was a term used to refer to bread taken on credit or damaged loaves by the claimant during production, no supporting evidence was tendered. The respondent did not even specify how much bread was taken on credit or damaged by the claimant. I therefore grant the claim for payment of Kshs.20,914 deducted as salary advance between March 2012 and August 2013. However the for alleged illegal union dues deductions between March 2012 and August 2013 amounting to Kshs.4,738 is dismissed. Although the claimant denied that he was a member of the trade union, Rw1 explained that the deductions were Agency fees levied against all unionsable employees who benefited from the CBA negotiated between the union and the respondent.

## **Conclusion and Disposition**

21. For the reasons that the dismissal of the claimant was unfair, I enter judgments for him in the sum of Kshs.114,298.25 plus costs and interest from the date hereof. The said sum shall be paid less statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018**

**ONESMUS N. MAKAU**

**JUDGE**