



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.277 OF 2017

[Formerly Cause No.50 of 2016 – Kisumu]

ERICK KAMAU .....CLAIMANT

VERSUS

NEW KENYA CO-OPERATIVE CREAMARIES LIMITED .....RESPONDENT

JUDGEMENT

1. The claimant, a male adult was employed by the respondent company at the Eldoret Plant as a General Clerk in the Production Department from 10<sup>th</sup> May, 2010 to 21<sup>st</sup> January, 2014 when he was dismissed.

**Claim**

2. On 25<sup>th</sup> July, 2013 while the claimant was on duty, he was arrested following reports by the respondent with the Police Station at Eldoret that the claimant had engaged in theft by servant.

3. On 29<sup>th</sup> July, 2013 the claimant was arraigned in court and charged with theft by servant contrary to section 281 of the Penal Code before the Chief Magistrates Court in Criminal Case No.3345 of 2013 at Eldoret. For 2 years and until 30<sup>th</sup> October, 2015 the police caused the claimant to appear, attend and be present in court to attend the prosecution of the case when the same was dismissed and the claimant acquitted under section 215 of the Criminal Procedure Code.

4. While the criminal proceedings were on-going, the respondent suspended the claimant through letter dated 25<sup>th</sup> July, 2013 and subsequently terminated his employment through letter dated 21<sup>st</sup> January, 2014.

5. The claimant's case is that his suspension and eventual dismissal from his employment was without justification and in contravention of the constitution and the Employment Act. The respondent caused and continues to cause the claimant grave harm, damage and loss.

6. The claimant was injured in his reputation and put into great harm, anxiety and owing to the unfair suspension and dismissal; he has lost and now claims Kshs.1, 809,937.86 as terminal dues from the claimant. Such claims comprise of;

*(a) Salary for 30 months from May, 2013 to October, 2015; Basic salary plus house allowance Kshs.463, 889.00*

*(b) Unpaid overtime;*

*May to July 2013*

*May Kshs.4, 257.89*

*June Kshs.6, 850.68*

*July Kshs.4, 731.91*

***Total Kshs.15, 840.70***

*(c) Unpaid rest days; June to December, 2010 for 13 days Kshs.14, 997.00 January to December 2011 for 21 days Kshs.17, 521.00 January to December 2012 for 21 days Kshs.18, 893.00 January to December 2013 for 14 days Kshs.19, 938.00 January to*

December 2014 for 21 days Kshs.20, 938.00 January to December 2015 for 17 days Kshs.21, 685.00

**Total Kshs.113, 872.00**

(d) Retirement; From 2016 to 2020 Basic pay plus house allowance for 5 years **Kshs.1, 064,340.00**

(e) Annual leave; Year 2016 to 2020 Kshs.5, 000.00 x 5 years Kshs.25, 000.00

(f) Gratuity – 2011 to December, 2020 Kshs.126,996.16

7. The claimant is also seeking his costs, general damages for unlawful dismissal from employment; special damages as claimed; and issuance of a Certificate of Service.

8. The claimant testified that on 10<sup>th</sup> May, 2010 he was employed by the respondent as a General Clerk on a 6 months contract. He contract ended and was renewed by letter dated 20<sup>th</sup> May, 2013 and also another renewal for 3 months with effect from 1<sup>st</sup> May, 2013. Despite the letter of appointment being for General Clerk, the claimant undertook duties of a Machine Operator and was paid Kshs.13, 772.00 basic pay plus Kshs.2, 066.00 in house allowances. The salary was increased based on annual wage increments by the government and the respondent continued to issue contracts of between 6 to 3 months. Cumulatively the claimant worked for 3 years.

9. On 9<sup>th</sup> July, 2013 while the claimant was in production work when he was informed that some cartons of powdered milk had disappeared and on 25<sup>th</sup> he was arrested by the police and charged before the Chief Magistrates court, Eldoret. The claimant was accused of being responsible for the missing cartons of powder milk.

10. Upon being charged in court, the claimant was suspended from duty vide letter dated 25<sup>th</sup> July, 2013. On 18<sup>th</sup> August, 2013 the claimant was called to the respondent's head office for disciplinary hearing at Nairobi. The salary had been stopped and has never been paid. On 23<sup>rd</sup> December, 2013 the claimant attended his disciplinary hearing and the panel only wanted to know how the powder milk got lost and why he was arrested. The panel refused to look at the records setting how the powder milk had moved, the applicable codes and the fact that no milk had been lost. There was a clear conciliation of the records but he was not given a fair hearing and was sent away in the night.

11. On 28<sup>th</sup> January, 2014 the claimant received a letter terminating his employment backdated to the date of suspension. There was no payment. The allegations made against him were not true. The claimant lodged an appeal but has never been given feedback.

12. Despite the claimant case, the claimant remained the employee of the respondent and was not able to secure new employment. He should be paid for the time spent and during the criminal case hearing. The claimant has since filed a case against the Attorney General and the respondent over his problems faced during the criminal trial. Such claim has no relations with suit herein.

## **Defence**

13. In response the respondent's case is that upon employing the claimant he was dismissed upon due process and his arrest and arraignment in court followed investigations by the police. Following internal procedures, the claimant was given a hearing where he was heard on his defence. The suspension and dismissal from employment were conducted fairly and in accordance with the collective bargaining agreement.

14. The claims made by the claimant are not justified and the tabulation of general damages not proved. The amounts pleaded for overtime, unpaid rest days, retirement, annual leave and gratuity are not payable and is in complete misapprehension of the law and terms of employment.

15. In evidence, the respondent called three witnesses. Daniel Chesire testified that on 9<sup>th</sup> July, 2013 while in the course of his duties he was sent to collect goods at Sosiani Factory Stores by Ms Josephine Ireri and he used the respondent's motor vehicle registration Number KAV 531E. Upon arrival he was attended to by the claimant and he loaded the powder milk without him confirming the number. The delivery book indicated that 150 cartons of 3 kgs had been loaded.

16. Mr Chesire also testified that the following day on 10<sup>th</sup> July, 2013 Ms Ireri instructed him to transfer 12 cartons into the vehicle together with other products for delivery at Kitale. While at Kitale he parked the vehicle at Trans-Mattresses supermarket and was sent away while Ms Ireri made transactions. Upon return all goods had been offloaded. The witness was then summoned by the security officer, Opiyo to explain about the 12 cartons of powder milk.

17. The witness also testified that in the criminal case when the claimant and Ms Ireri were charged he was a prosecution witness and testified that while at Sosian Factory Stores, the claimant gave him a delivery note in confirmation of what had been loaded and this was checked at the gate but he had not been present when the loading was done.

18. The second witness for the respondent was Joseph Odhiambo, Security Manager and who testified that the respondent had a private security firm at its depot and he investigated the matter upon a report that there were 12 cartons of powder milk which were found with the claimant and Ms Ireri. He relied on the delivery note issued to Mr Chesire and the movement of products from Sisian Factory and delivery to the market. On the records for 9<sup>th</sup> July, 2013 the delivery note book by Ms Ireri noted 150 cartons and the guard at the gate noted the same. But in the vehicle there were 12 more cartons which Ms Ireri took to Kitale and when Chesire was told to pick invoices, he found the 12 cartons had been offloaded. The investigations concluded that the claimant and Ms Ireri had colluded to sell the powder milk worth Kshs.59, 400.00.

19. The witness also testified that following the investigations the respondent conducted disciplinary hearing and the claimant together with Ms Ireri were dismissed.

20. The witness also testified that on 9<sup>th</sup> July, 2013 as the motor vehicle left the Sosian Factory depot the consignment loaded was checked and the records are that 150 cartons had been loaded. The delivery note was to follow the products in confirmation. For the vehicle to be cleared at the gate, Mr Chesire should have checked the delivery book and the security at the gate confirmed the same.

21. The other witness for the respondent was Michael Mukopi, the Industrial Relations Manager at the time the claimant's case arose. That following theft of 12 cartons of powder milk investigations were conducted and the employees involved were taken through internal disciplinary proceedings. On 12<sup>th</sup> December, 2013 the claimant was invited to hearing at the Nairobi head office and the witness was the secretary. The claimant was given a fair chance to defend himself and a decision was taken. The claimant contradicted some of his statement but failed to give satisfactory answers.

22. The witness also testified that upon the dismissal of the claimant he was required to undertake clearance to be paid his final dues of leave, salary owing and other work benefits. The claimant has since failed to clear and he did not lodge an appeal against the decision to dismiss him.

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

In analysis the matter herein, account has been given to the pleadings, the evidence of the parties and the written submissions. The issues which emerge for determination are;

Whether the summary dismissal of the claimant was fair or unfair;

Whether there is a case for grave harm on the claimant and thus a good basis for payment of damages;

Whether the remedies sought are available to the claimant.

25. The claimant was employed by the respondent under various contracts ranging from 3 and 6 months and upon lapse, there was a renewal until his last contract and dated 20<sup>th</sup> May, 2013 and ending 31<sup>st</sup> July, 2013. The different contract covered the periods of;

10<sup>th</sup> May, 2010 to 17<sup>th</sup> November, 2010 for 6 months;

18<sup>th</sup> May, 2011 to 19<sup>th</sup> November, 2011 for 6 months;

and 20<sup>th</sup> May, 2013 to 31<sup>st</sup> July, 2013 for 3 months.

26. Each contract had a fixed term and each run its course and would be renewed or a new one issued.

27. During the last contract ending 31<sup>st</sup> July, 2013 the claimant was accused of causing the disappearance of powder milk and on 25<sup>th</sup> July, 2013 he was arrested by the police and charged in Criminal Case No.3345 of 2013 at the Chief Magistrate's Court, Eldoret for stealing by servant under the provisions of section 281 of the Penal Code.

28. Through letter dated 25<sup>th</sup> July, 2013 the claimant was suspended from duty. On 23<sup>rd</sup> December, 2013 the claimant attended a disciplinary hearing and by letter dated 21<sup>st</sup> January, 2014 he was terminated from his employment on the grounds that;

*... you intentionally loaded without formal permission 2 cartons of code 1008 and 10 cartons of code 1006 without using approved documents thereby facilitating theft of the same which you personally agreed in your statement.*

*During the disciplinary committee hearing you even claimed that no milk was lost yet records indicate clearly the product loss and where they were sold in Kitale this is a serious offence and this letter therefore serves to advise you of your dismissal from employment with effect from 25<sup>th</sup> July 2013 for having contravened clause 23(1) and (iv) of the CBA through negligence of duty and collusion to defraud the company. ...*

29. While the claimant was undergoing internal disciplinary process, the criminal trial was on-going and on 30<sup>th</sup> October, 2015 he was acquitted under section 215 of the Criminal Procedure Code.

30. Section 44(4) of the Employment Act, 2007 allow for summary dismissal of an employee for gross misconduct and particularly where the employee is found to have;

*(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.*

31. Section 44(4) of the Act is subject to the provisions of section 41(2) of the Act and which requires an employer to hear and consider any representations which the employee may have in defence of allegations made against them.

32. Save for the on-going criminal proceeding undertaken against the claimant under CMCC No.3345 of 2013, Eldoret for theft by servant, the claimant was invited to the internal disciplinary hearing and he attended on 23<sup>rd</sup> December, 2013.

33. In the criminal proceedings, the claimant was acquitted on 30<sup>th</sup> October, 2015. In the internal disciplinary hearing, the claimant was dismissed from employment on the ground that the respondent found sufficient cause and basis that there had loss of its products through the negligence of duty and collusion to defraud the company based on the conduct of the claimant.

34. In this regard, the claimant has relied on the case of **Mathew Kipchumba Koskei versus Baringo Teachers Sacco [2013] eKLR** and the findings that while the claimant, the employee was undergoing criminal trial as well facing internal disciplinary hearing and where he was found innocent in the criminal trial, the administrative finding that he was culpable was an error. However, in 2014 Court of Appeal in addressing the rationale of criminal proceedings and internal disciplinary proceedings in the case of **Judicial Service Commission versus Gladys Boss Shollei & Another (2014) eKLR** held that;

*... Notwithstanding the seriousness of the allegations made against the respondent, the disciplinary proceedings could not be treated like criminal proceedings, as the nature of the sanctions that could be applied in a criminal trial. Thus the learned judge misdirected himself, in holding that the disciplinary proceedings were quasi-criminal. The Criminal Procedure Code which is an Act providing for the procedure in criminal cases had absolutely no application in the disciplinary proceedings, and the learned judge erred in applying the provisions of the Criminal Procedure Code.*

35. Earlier on in the year 2000 the Court of Appeal in the case of In **Kibe versus Attorney General Civil Appeal No. 164 of 2000** held that;

*An acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee going against the outcome does not by itself render the employer's decision wrongful or unfair.*

36. The above decision was followed with approval in the case of **Attorney General & another versus Andrew Maina Githinji & another [2016] eKLR** where the Court of Appeal held as follows;

*... [there is] a distinction between internal disciplinary proceedings of an employer and criminal proceedings was upheld for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required.*

37. In this case, where the respondent invited the claimant by notice to attend disciplinary hearing on 23<sup>rd</sup> December, 2013 and the claimant attended; there was compliance with the law in accordance with section 41(2) of the Employment Act, 2007. The outcome findings therein that the claimant should be dismissed for negligence of duty followed the provisions of section 44(4) of the Act.

38. The respondent had followed a fair procedure in addressing the claimant's case.

39. However, were such allegations of negligence and intention to cause loss of property genuine, valid and with justification?

40. Section 43 of the Employment Act, 2007 requires an employer to prove the reasons for a termination of employment; section 45(2) of the Act requires the employer to prove that the reasons for termination of employment are valid and fair reasons while section 45(4) of the Act requires an employer to act in accordance with justice and equity in terminating an employee; section 47(5) of the Act obliges an employer to justify the grounds for terminating an employee. These sections of the Act address what is called substantive fairness in termination of employment.

41. From the evidence on record in this case, Mr Chesire for the respondent testified that when he went to Sosian Factory depot he left and returned to find the vehicle loaded with goods and a delivery note which he used to move the vehicle outside the premises and the following day he left with the cargo to Kitale together with Ms Ireri. That all goods loaded are confirmed by the security personnel at the gate.

42. Mr Mukopi also testified that when conducting the internal disciplinary hearing for the claimant, the panel relied on the statement of the claimant where he admitted to the production and loading of the subject goods. However, the claimant challenged these statements and denied ever making an admission and in fact, the filed statement bears different names to those of the claimant. The subject dates are equally not in tandem with the allegations made and the applicable dates.

43. Noting the above, I find no genuine, valid and justifiable ground leading to the dismissal of the claimant. Despite following due process in the disciplinary hearing, the same lacked substantive justice and contrary to section 45(2) of the Act.

44. Compensation is due under the provisions of section 49 of the Employment Act, 2007 and the claimant is awarded three (3) months' Notice pay all at Kshs.47,514.00 based on his last gross wage paid under the last fixed term contract

45. On whether there are damages due for grave harm on the claimant, on the finding that there was due process with regard to employment and labour relations matters herein and for lack of substantive justice the same is herein addressed and redressed, to claim over harm to the person is without specific evidence and must fail. In any event the claimant testified that he has since commenced proceedings against the state and the respondent for damages arising out of the criminal proceedings. Even where he has not, I find no material sufficient to justify

the claim for damages herein on the allegations that there was grave harm to the claimant following his dismissal and charges at the magistrates Court, Eldoret.

46. On the remedies due, the claim for salary due for 30 months from May, 2013 to October, 2015 is on the basis that the claimant remained the employee of the respondent until the criminal trial ended. However termination of employment was effected by letter dated 21<sup>st</sup> January, 2014. Employment effectively ended on this day.

47. Despite the claimant being on a fixed term contract and ending 31<sup>st</sup> July, 2013 the respondent proceeded and suspended the claimant and invited him for disciplinary hearing and did not communicate termination of employment until vide letter of 21<sup>st</sup> January, 2014. Salaries due for this period are due. based on the last payable gross wage of Kshs.15,838.00 per month, for the six (6) months the claimant was maintained as the employee of the respondent for the purpose of disciplinary hearing and despite his contract having lapsed, such period is quantified and wage due Kshs.95,028.00 is payable.

48. On the claim for overtime pay, there is no record by the respondent to challenge the claims set out due to the claimant for the period of May to July, 2013. Where there were work records setting out the reporting timelines for the claimant to controvert the claims, the duty was on the respondent under section 10(7) of the Employment Act, 2007 to submit with the court. The defence that the claimant has failed to clear with the respondent so as to be paid his terminal dues was empty and without the respondent setting out what dues existed for the claimant to collect.

49. The claimant is hereby awarded overtime payment amounting to Kshs.15,940.00.

50. On the claims for unpaid rest days, the claimant has set out a schedule running from 2010 to 2015.

51. The claim herein was filed on 22<sup>nd</sup> February, 2016. As noted above, the claimant was under fixed term contracts for the entire duration of his employment with the respondent save for the last part where he was kept in employment for disciplinary proceedings. In this regard and on the claimants for dues for unpaid rest days, claims subject to the provisions of section 90 of the Employment Act, 2007 are not due. These relates to claims over three (3) years old and under contracts that had since lapsed as such formed a different work relationship and terms.

52. On the same vein, all claims arising outside the employment period and after termination of employment in January, 2014 are without justification. Effectively, the claimed unpaid rest days due are those for the period of January, to December, 2013 and in this period the only contract submitted is that covering the period of May, to July, 2013 and the additional time of August, 2013 to January, 2014. In this period there are only six (6) gazetted public holidays and all computed to kshs.9,969.00.

53. On the claim for salaries until retirement, employment ended upon termination on 21<sup>st</sup> January, 2014. The substantive unfairness of the same is addressed. I find no justification that the claimant should seek salaries until his retirement on the basis of such termination of employment.

54. Annual leave is not due as claimed.

55. Claim for gratuity, this is claimed on the basis that it is due from 2013 to December, 2020. The claimant testified that he was not unionised. However, in defence there are various references to the application of a collective bargaining agreement. Indeed in the letter terminating the claimant's employment, great reliance is on the CBA and its provisions. Where indeed there is a CBA in place with the respondent, its provisions on the payable gratuity for the period of employment should be applied on the claimant without discrimination. I bring to the attention of the respondent the provisions of section 26(2) of the Employment Act, 2007 which provides that;

*(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.*

56. The terms of the referenced CBA by the respondent shall apply to the claimant with regard to the assessment of the gratuity payable to him. Such should be computed and paid in 30 days.

**Accordingly, judgement is hereby entered for the claimant with a declaration that termination of employment was substantively unfair and the claimant is awarded compensation at Kshs. 47,514.00; overtime pay at Kshs.15,940.00; unpaid salaries Kshs.95,028.00; unpaid rest days Kshs.9,969.00; gratuity due to be assessed and paid in accordance with the CBA. The claimant is awarded costs.**

Delivered in open court at Eldoret this 26<sup>th</sup> day of September, 2018.

**M. MBARU JUDGE**

In the presence of:

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