



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 225 OF 2017**

**JOSEPH NZOMO MUNYENGE.....CLAIMANT**

**VERSUS**

**AUTO EXPRESS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant seeks to recover after his summary dismissal on 20<sup>th</sup> February 2017 on allegations that he falsified his lunch records when he was off duty and refused to obey instructions issued by the immediate supervisor. He was a workshop assistant from 1<sup>st</sup> October 2014 up to 30<sup>th</sup> September 2015 at the Respondent's workshop/service centre at Thika. He averred that he worked diligently till his dismissal without notice or being heard. He asserted that he had no disciplinary issue prior and contended that the dismissal was contrary to the rights he was entitled to under the provisions of Article 50 of the Constitution and Section 47 of the Employment Act and therefore his dismissal was unfair and wrongful in the circumstances. He sought unpaid salary for the month of February – Kshs. 20,782/-, on month in lieu of notice – Kshs. 20,782/-, leave pay for one year – Kshs. 20,782/- and compensatory damages equivalent to 12 months salary – Kshs. 249,384/-. The Claimant thus sought a declaration that his dismissal was unlawful and violated the Claimant's rights to fairness and fair labour practices as provided for under Article 50 of the Constitution and the Employment Act, compensatory damages amounting to Kshs. 311,730/- as well as costs of the suit and interest at court rates.

2. The Respondent in its answer to the memorandum of claim stated that the Claimant's employment ended on or about 20<sup>th</sup> February 2017 when the Claimant was dismissed for insubordination and falsification of records. The Respondent averred that it pays for lunch served to its employees at the restaurant and employees who are not on duty are not entitled to take lunch at that restaurant for settlement by the Respondent. However, the Claimant was in the habit of taking lunch there on his off days and did so on 14<sup>th</sup> and 23<sup>rd</sup> January 2017 despite clear instructions not to do so. The Respondent averred that it employs about 540 employees all of whom are provided with lunch and any misconduct in failing to adhere to the rules relating to lunches of spread over its workforce would become unmanageable and cause the Respondent huge losses. The Respondent asserted that the Claimant was accorded an opportunity to give a formal explanation in writing and he gave his defence through a letter dated 17<sup>th</sup> February 2017. The Respondent averred the Claimant's action amounted to insubordination and amounted to gross misconduct which warranted summary dismissal under Section 44(4)(e) of the Employment Act. The Claimant did not appeal the decision to dismiss him nor report the matter to the Labour Office or to his union the Kenya Union of Commercial Food and Allied Workers (KUCFAW). The Respondent averred that the Claimant received all his dues upon dismissal and that no notice of intention to sue was issued nor was any demand made thus disentitling the Claimant to costs in the event he is successful in this claim. The Respondent sought for the dismissal of the suit with costs.

3. The Claimant testified that he was employed on 1<sup>st</sup> April 2014 and was confirmed in October 2014. He was earning 21,000/- a month. He stated that he was called by his supervisor and told that he was needed in Nairobi at the headquarters where upon arrival he was given a summary dismissal letter. He testified that prior to dismissal he was not called for a hearing and that the arrangement was for the staff to have lunch at a hotel called Cascade where lunch allowance was Kshs. 100/-. He stated that any consumption above the allocated amount was to be settled by the employee and there were allegations that he had exceeded the allocation by 10/- and 50/- on the two occasions. His testimony was that he sought to know if the invoice had been sent to the company and was advised that the invoice could not be altered and he therefore saw the team leader and was told it was okay and was to pay the difference. He was dismissed and he sought legal redress hence the suit.

4. In cross-examination he stated that he was given the dismissal letter for exceeding his meal allocation. He testified that he could have been notified of the reason for the dismissal. He admitted that the letter explained the reason for the dismissal. He stated that he did not have the money to pay the excess amount and that the team leader okayed his repayment of the sum later. He stated that he was entitled to payment of notice and was entitled to leave allowance which he was not paid. He was referred to the final payslip and he admitted that he was paid his leave encashment totalling to Kshs. 11,000/- as part of his final dues.

5. In re-examination he stated that he had explained to his supervisor that he did not consume the food when he was off duty. He stated that

the dismissal for the falsification of lunch records when he was off duty was baseless.

6. The Respondent called Eric Kiboro Gitere who testified that he was a manager at the Respondent. He stated that he was notified by the Claimant's supervisor that the Claimant had exceeded his allocation for lunch on days he was not at work on 14<sup>th</sup> and 23<sup>rd</sup> January per the register. He testified that he called the Claimant through the supervisor and the Claimant on being questioned about it stated he would refund. He stated that he said he would pay but in his statement declined to own up which was gross misconduct leading to summary dismissal.

7. In cross-examination he testified that the Claimant was summoned by the supervisor and the amount was meagre and it was expected that the Claimant would pay. He was referred to Clause 17.3 of the contract of employment and admitted that the Claimant was not called in the company of a witness of his choice. He stated the proceedings that were held were not recorded. He testified that an employee was not limited to what he could eat and the employee was responsible for the extra. He confirmed that the Respondent did not deduct the money from the payment made in February and this showed leniency on the part of the Respondent as the Claimant had falsified records.

8. In re-examination he stated that where the employees were provided lunch was an independent entity and that the receipts had been signed and the Claimant did not deny they were his. He stated that any extra was to be paid for in cash at the counter and whatever was not paid for was billed to the company.

9. The parties filed written submissions and in his submissions the Claimant submitted that the taking of meals while on leave was a fabrication as he lived far from the company. He stated that no show cause letter was issued in this regard and that the testimony by the Respondent's witness was hearsay. He submitted that the Respondent did not even adhere to the provisions of the contract and failed to establish any valid reason for the summary dismissal. The Claimant submitted that the dismissal was unfair in terms of Section 42 and relied on the case of **Donald Odeke v Fidelity Security Limited [2012] eKLR** where Ndolo J. held that *an employee facing disciplinary action must be given adequate opportunity to respond to any charged before any action is taken against them*. The learned judge went on to add that *it does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair*.

The Claimant further submitted that even where a hearing has been given, the reasons for the dismissal must be valid. The Claimant relied on the case of **Alex Akoth Ndonga v Kenya Revenue Authority [2015] eKLR** and availed copies of the cases of **Gibson D. Mwanjala v Kenya Revenue Authority [2015] eKLR**, **Moses Kaunda Moro v CMC Motors Group Ltd [2013]**, **Joseph Otieno Nyolo v Rift Valley Railways (K) Limited [2014] eKLR** and **Kenya Petroleum Oil Workers Union v Kenya Shell Limited [2014] eKLR**. The Claimant submitted that he was entitled to the grant of the prayers sought in his claim.

10. The Respondent on its part submitted that the Claimant falsified lunch records on days he was off as per the attendance register and exceeded the standard amount by Kshs. 50 and Kshs. 10 respectively. The Claimant was asked to give an explanation in writing which he did and because he was in breach of company policy on lunch allowance he was summarily dismissed. The Respondent submitted that the reasons for the summary dismissal were explained to the Claimant who was off duty and who failed to obey instructions issued by his immediate supervisor and because of the falsification of lunch records was dismissed. He did not pay for the portion of his lunch that exceeded the limits and because he was aware that the meals were to be limited to Kshs. 100/- and were to be consumed on account of the Respondent only when one was on duty he was asked to explain. He wrote admitting the mistake and that he was advised by his team leader of the excess amount but he did not have the money to pay. It was submitted that the fact that he lived far from the workplace did not negate the fact that he took lunch at the work premises. Reliance was placed on the case of **Bamburi Cement Limited v William Kilonzi [2016] eKLR** where the Court of Appeal (Makhandia, Ouko & M'Inoti JJA) held that *the employer may only resort to summary dismissal when the employee has, by his or her conduct fundamentally breached his or her obligations arising out of the contract of service*. It was the Respondent's position that the Claimant breached an obligation of his contract by falsification of lunch records. The Respondent submitted that the Claimant was not entitled to the prayers sought.

11. The matter relates to the dismissal of the Claimant from his employ for exceeding his lunch allowance by a paltry Kshs. 60/- culminating in his summary dismissal. I have distilled the issues for determination as follows:-

- a. Whether the Claimant was unfairly terminated
- b. Whether the dismissal was for a fair and valid reason
- c. Whether the Claimant is entitled to the prayers sought
- d. Who is to bear the costs

The dismissal of the Claimant was on account of the excess consumption of food at the Cascade Restaurant where the Respondent had an arrangement for its employees who are on duty to consume food, sign off and the Respondent would pay a maximum of Kshs. 100/- per employee per meal. The Claimant is alleged to have consumed food in excess of the 100/- and failed to pay the difference as was required. The Claimant denied being off duty on the days he was stated to have had the meals. He however admits he consumed food that was in excess of his limit and did not pay the invoice because he did not have money. He says he was not given an opportunity to be heard. He was dismissed after the inquiry that was made by his manager and in tandem with company policy. He was summarily dismissed. The Claimant was dismissed for an act that at best would have attracted a warning, or at worst a severe warning. The fact that he was dishonest in his conduct however, caused the trigger on Section 44 of the Employment Act. Section 44 provides as follows in the material part.

- (e) if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

12. The Claimant failed to obey a lawful command which triggered the dismissal. Section 44(1)(e) of the Act makes the action taken by employer though harsh as one of the consequences. The employee did not commit an egregious act but that meets the threshold for dismissal.

As to whether the Claimant was unfairly terminated I would answer in the negative. As to whether the dismissal was for a fair and valid reason I would say yes. As to whether the Claimant is entitled to the prayers sought I would answer in the negative. As to who is to bear the costs I would answer that the parties are each to bear their own costs so as to put this matter behind them. Suit is therefore dismissed with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 20<sup>th</sup> day of September, 2018**

**Nzioki wa Makau**

**JUDGE**