



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 762 OF 2014**

**BETWEEN**

**JEREMIA NGATIA MWAI.....CLAIMANT**

**VERSUS**

**EMMA NYAMBURA MURIUKI**

**t/a METRO BUTCHERY LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Omao Omosa & Company Advocates for the Claimant*

*Kihang'a & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 9<sup>th</sup> May 2014. He avers he was employed by the Respondent, between 1<sup>st</sup> September 2011 and 12<sup>th</sup> April 2014. He sold pork at Respondent's butchery. He was summarily dismissed by the Respondent on the latter date. He states he was not granted the opportunity to defend himself. He was not given the reason for the decision. There was no notice. He was not paid any terminal benefits. His last salary was Kshs. 8,000 monthly. He prays for Judgment against the Respondent in the following terms:-

- a) Unpaid annual leave of 2 years and 8 months at Kshs. 22,000.
- b) Unpaid annual leave of 3 years at Kshs. 39,951.
- c) Severance pay at 1 month salary for each year worked at Kshs. 22,000.
- d) 3 month's in lieu of notice at Kshs. 24,000.
- e) Transport one way home, together with family at Kshs. 10,000.

Total...Kshs. 110,000.

- f) Declaration that termination was unfair and unlawful.
- g) Costs.
- h) Interest.
- i) Any other suitable relief.

2. The Respondent filed her Statement of Response and Counterclaim, on 21<sup>st</sup> May 2014. Her position is that she employed the Claimant on or about 28<sup>th</sup> August 2012, until 12<sup>th</sup> March 2014 when the Claimant absconded. He assaulted his Co-Employee Samuel Munene, and

disappeared without trace. He stole goods worth Kshs. 48,000 from the Respondent. The Respondent counterclaims from the Claimant a total sum of Kshs. 171,346 with interest. The Respondent asks the Court to dismiss the Claim and grant the Counterclaim.

3. The Claimant filed Reply to the Statement of Response and Counterclaim, on 30<sup>th</sup> May 2014. He denies owing the Respondent any amount of money. He did not abscond, or assault any of his Colleagues. He prays for dismissal of the Counterclaim.

4. Hearing date was scheduled by the Registrar of the Court for 19<sup>th</sup> April 2018, falling within the Court's service week. There is a notice of hearing on record, suggesting Parties were informed by the Court, about the hearing date. The Respondent did not attend Court, and hearing proceeded *ex parte*.

5. The Claimant gave evidence and rested his case on 19<sup>th</sup> April 2018. He told the Court he was employed as a Meat Seller. He was assaulted while at the butchery on 12<sup>th</sup> April 2014. The Respondent gave him permission to seek medical attention. The following day, the Respondent told the Claimant there was no more work. He was not presented with any allegations, or chance to defend himself. He did not instigate the fight leading to his injury. He never went on annual leave throughout. He only took off-duty days of 3 days after every 3 months. He earned monthly salary of Kshs. 8,000.

**The Court Finds:-**

6. The Respondent did not attend Court, and therefore, the first duty the Court must discharge, is to dismiss the Counterclaim for want of prosecution, nonattendance and lack of evidence.

7. The second duty is for the Court to answer these questions: whether the Claimant was fairly dismissed, taking into account the requirements of Sections 41, 43 and 45 of the Employment Act 2007; and whether he merits the remedies sought?

8. He told the Court he was dismissed a day after he engaged a Colleague in a fight. He was injured in the altercation, and sought medical attention on 13<sup>th</sup> April 2014. He was on return to work, told by the Respondent there was no more work for him.

9. The Claimant did not satisfy the Court that he was the victim of his Co-Employee's aggression. There occurred a fight at the butchery, between the Claimant and his Colleague Munene. Regardless of who started the fight, it was out of order for the 2 Employees to engage in a fight at the workplace. They brought their Employer's business into disrepute. Employers as concluded by the Court in ***Dede Esi Annie Amanor Wilks v. Action Aid International [2014] e-KLR***, have the right to have harmonious working relationships within their enterprises. They have the liberty to weed out trouble-makers, eccentrics and disruptive Employees.

10. The Respondent however does not say she terminated the Claimant's contract, because the Claimant assaulted Munene; the Respondent states the Claimant assaulted Munene, and then absconded. The reason for termination is not that the Claimant fought; it is that he absconded. There is no evidence that the Claimant absconded. He denies that he absconded. He was told by the Respondent there was no more work. In the absence of evidence from the Respondent, the assertion that the Claimant abandoned, is not a valid and fair reason. The Respondent did not give the Claimant a hearing. She just told the Claimant to pack bag and baggage, and leave the butchery.

**11. Termination was unfair under Sections 41, 43 and 45 of the Employment Act 2007.**

12. The Claimant prays for notice pay, equivalent of 3 months' salary. He has not shown why 3 months. There is no contractual clause, wage instrument, or statutory provision invoked, to justify 3 months' salary as notice pay. **He is granted 1 month salary at Kshs. 8,000 as notice pay.**

**13. He is granted the equivalent of 6 ½ months' salary at Kshs. 52,000 in compensation for unfair termination.**

14. He pleads separately for annual leave pay of 2 years, 8 months, and 3 years. Separate figures are pleaded. He did not explain to the Court why he should be granted these separate claims, adding up to 5 years 8 months, as annual leave pay. He did not work for an aggregate period of over 5 years. These prayers for separate annual leave pay are not clear and are rejected.

15. The prayer for transport one way home has no support in evidence. The Claimant did not say why he needed transport one way home; and why the Respondent should cater for his, and his family's transport. There is no law, no wage instrument or contractual clause, brought to the attention of the Court, warranting that the Claimant is paid transport one way home. The item is declined.

16. Equally unfounded is the prayer for severance pay, calculated at 1 month salary for every complete year of service. It was not the position of either Party that the Claimant left employment on redundancy. Severance pay would only be considered if termination was under Section 40 of the Employment Act 2007. There is no evidence or suggestion, anywhere in this Claim and Counterclaim, that termination was by way of redundancy. The prayer for severance pay is rejected.

**17. No order on the costs.**

**18. Interest granted at 14% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

**a) Termination was unfair.**

**b) The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 8,000 and equivalent of 6½ months' salary in compensation for unfair termination, at Kshs. 52,000- total Kshs. 60,000.**

**c) No order on the costs.**

**d) Interest allowed at 14% per annum from the date of Judgment till payment in full.**

Dated and signed at Mombasa this 19<sup>th</sup> day of September 2018.

James Rika

Judge

Dated, signed and delivered at Nairobi this 5<sup>th</sup> day of October 2018.

Nelson Jorum Abuodha

Judge