



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2004 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 3rd October, 2018)

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

UCHUMI SUPERMARKET.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 11/11/2014 through their Secretary General alleging unlawful/unfair termination of Mr. Patrick Omuse.
2. The Claimants aver that they have a Collecting Bargaining Agreement (CBA) with the Respondent, which set out terms and conditions of service for all unionisable employees of the Respondent as per Appendix.
3. They aver further that the grievant Patrick Omuse was employed by the Respondent on 1-10-2008 on a 3 months renewable contract and later he was employed on 1-1-2010 on permanent and pensionable terms earning a gross salary of Kshs.17,500/= (Appendix 2).
4. The salary of 1st grievant was reviewed upwards to 20,125/= on 26/9/2011 (Appendix 3). The Claimants aver that the 1st grievant was a cashier and used to receive cash and issue receipts to customers who bought goods from the City Square branch.
5. The 1st grievant gave evidence and stated that on 6.12.2011 while on duty serving a customer, he sold a 2kg white sugar as brown sugar. He tried to scan at the till and in the process entered a wrong code. The price was the same. In the process, the printer also failed. He asked the customer to go to Customer Care Centre to obtain a receipt. It was at this point that it was discovered that he had keyed in 'white sugar instead of brown sugar'.
6. After along time of consultation, he was found to be having a shortfall of 1000/= (page 15 of Defendant's Affidavit). He continued working and was signed off and allocated other duties e.g packing. He then left to go home.
7. The following day he reported to work but was not allocated work. On 14/12/2011, he was served with a dismissal letter. He appealed the dismissal but there was no response. He then decided to pursue this claim through his union.
8. In cross-examination, the CW1 told the Court that the customer was never stopped by security. He also admitted that he had written a statement in regard to the events of 15.11.2011 and admitted he had sold a customer airtime of 100/= and had not issued a receipt.
9. He however denied that he was taken through a disciplinary hearing on 9/12/2011. He also averred that he appealed the dismissal but has never received any response.
10. He also told the Court that he had a loan before and was informed that his dues paid for the said loan. He avers that he cleared with the Respondent. He told the Court further that the Shop Steward was not present at the meeting of 9/12/2011.
11. The Respondents opposed this claim. They filed their Memorandum of Reply to the claim on 13/4/2015 through the Federation of Kenya Employers (FKE). The Respondent's position is that the grievant's termination was lawful as the grievant was involved in irregularities of selling goods to customers without issuing receipts.

12. This was discovered on 6/12/2011 while the grievant was at work and the security supervisor observed that the grievant issued a customer with change and the customer proceeded to exist where the supervisor requested for the purchase receipt. The customer claimed that she had not been issued with any.

13. The security officer directed the customer to Customer Care Desk to report the issue. The customer supervisor inquired from the customer if she had used her U-card and on checking the system, the sugar sold was not found in the system.

14. The customer service attendant called up security and one Mr. Agala accompanied the customer to the customer's till to demand issuance of the receipt and clarify the issue. They aver that contrary to grievant's assertion the till was in good condition and could produce receipts without any difficulty.

15. With such discovery, the Claimant was asked to sign off and in his presence a spot check was conducted and it was found he had a shortfall of 2,097/= which was subsequently verified to be 1006/=.

16. Further investigations were done and the grievant was subjected to a disciplinary hearing on 9.12.2011. He was subsequently dismissed on 14/12/2011. The Respondents aver that the dismissal was lawful and they ask the Court to dismiss this claim accordingly.

17. The Respondent called 3 witnesses who reiterated their evidence as per the Memorandum of Defence.

18. In cross-examination, RW1 told Court that he is the one who stopped the customer and referred her to Customer Care.

19. RW2, the Customer Service Supervisor was brought to her by RW1. She went to data and confirmed no sugar had been sold by grievant.

20. RW3 on his part told the Court that the Claimant was referred to their department. They invited him for disciplinary hearing on 9.12.2011 but RW3 did not participate in the process. In cross examination he said that grievant was given an opportunity to defend himself.

21. They aver that they paid him his salary but not notice. That the grievant's pension was also paid out.

22. The Parties filed their respective submissions.

23. I have considered the evidence and submissions filed so far. The issues for determination are as follows:-

1. Whether there were valid reasons to dismiss the grievant.

2. Whether due process was followed.

3. Whether the Claimant is entitled to prayers sought.

24. On 1st issue, the grievant was ostensibly dismissed due to dishonesty. The dismissal letter indicated that he had procedurally sold to a customer a 2kg sugar without scanning the till.

25. The Respondent's witnesses gave evidence as to what transpired to which the grievant denied. However, the evidence of RW1 and RW2 tallied as to what happened and the position that indeed the grievant had not issued a receipt for this transaction was established.

26. It is my finding that there were therefore valid reasons to warrant dismissal of the grievant as envisaged under Section 43 of Employment Act which states as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

27. On issue No. 2, the law concerning due process in case of disciplining an errant employee is set out in Section 41 of Employment Act. The need to accord an employee a fair hearing and accord him an opportunity to give his version of the story and call witness and also cross-examine the Respondents witness is clear.

28. Section 41 of Employment Act 2007 states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or

summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

29. Even in situation where the employee is suspected of committing a gross misconduct the requirement for an opportunity to clear himself is mandatory as good practice and as a condition for adherence to rules of natural justice.

30. The Respondent contend that the grievant was given a hearing but there was no evidence in form of any letter inviting him to such a meeting and no minutes of the said disciplinary hearing. The averment by the Respondent therefore remained not proved.

31. Section 45(2) of employment Act 2007 states as follows:-

- (1) “A termination of employment by an employer is unfair if the employer fails to prove:*
- (a) that the reason for the termination is valid;*
- (b) that the reason for the termination is a fair reason:-*
- (i) related to the employee’s conduct, capacity or compatibility; or*
- (ii) based on the operational requirements of the employer; and*
- (c) that the employment was terminated in accordance with fair procedure”.*

32. Given that the grievant was not subjected to any disciplinary hearing, it is my finding that the dismissal was therefore unfair and unjustified.

33. Now in terms of remedies, I find the Claimant is entitled to the following:-

1. 1 months salary in lieu of notice = 20,125/=

2. Salary for days worked in December 2011 of 14 days = 10,837/=.

3. 6 months’ salary for unlawful termination = 20,125 x 6 = 120,750/=.

TOTAL = 151,712/=

4. The Respondent will pay costs of this suit and interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 3rd day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Monda for Union – Present

Kanyiri for Respondent – Present