



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1015A OF 2013**

**BERNARD JUMA OYIEYO.....CLAIMANT**

**VERSUS**

**KARIA SUPERMARKET LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 4.7.2013 alleging that he was wrongfully and unfairly dismissed from employment by the respondent on 26.4.2013 and prayed for Kshs.1,636,397 made up of accrued benefits plus compensation for unfair termination. The said amount was reduced to Kshs.1,069,267 through the amendment of the claim on 28.4.2016.

2. The respondent averred that she terminated the claimant's contract of service on 13.3.2013 because he absented himself from his place of work without permission, and also for lying to respondent's directors the reasons why he had failed to pick their phone calls. She further denied that the termination was unfair and contended that it was done for a valid reason and after due process. She therefore prayed for the suit to be dismissed with costs adding that the reliefs sought are not justified.

3. The suit was heard on 30.3.2017, 6.3.2018 when claimant testified alone but the respondent called her two Directors as her witnesses. Thereafter both parties filed written submissions which I have carefully considered herein alongside the pleadings, and the evidence tendered.

**Claimant's case**

4. The claimant testified that he was employed by the respondent on 7.1.2002 as a Shop Attendant earning Kshs.13,000 per month. He worked until 13.3.2013 when the respondent's Director Mr. John Kuria took away his phone and ordered him to leave the shop without giving any reason. He further testified that he went outside and remained there until 4.00 p.m. when Mr. Kuria left without talking to him. He then went back to the shop but Mrs Kuria gave him the phone and told him to go away until he was called back.

5. The claimant stated that after one month of waiting, he received no call and he went to the shop on 26.4.2012 but Director told him to wait outside until 1.00 p.m. when he was told him that there was no work for him and as such he should collect his dues the following day when he was paid Kshs.48,403. He contended that the amount was not satisfactory but he nevertheless signed for the same and thereafter instructed his lawyer to sue the respondent.

6. The claimant further testified that he was never given any appointment letter and he used to work from 7 a.m. to 8.30 p.m although he had initially been told that his working hours were from 7 a.m. to 6 p.m. He contended that he used to work 4½ hours overtime every day and he was paid for the same until 2007 when the payment was stopped. He further testified that he was not being paid House Allowance but only the Kshs.13,000 without any particulars on the salary voucher.

7. The claimant further contended that he never went on leave and he was not paid his salary for March and April 2013 when he was told to stay at home until he was called.

8. On cross examination, the claimant contended that when the Director arrived at the shop on 13.3.2013, he was at the store outside. He stated that upon return to the shop Mrs. Kuria asked him the whereabouts of his phone and why he was not picking her calls and he told her that the phone was without charge. That when Mr. Kuria came to the shop later, he just picked his phone without asking any question and ordered him to wait outside the shop. He dined telling Mrs. Kuria that he had left the phone at the shop and maintained that he told her that the phone had no charge. He denied the alleged habit of leaving the shop without permission and denied ever being warned.

9. He admitted that on 27.4.2013, he was given a form with computation of his dues by the respondent's Accountant and he signed. He contended that he did not sign voluntarily but due to pressure from family needs. He contended that he was told that without signing the form, he would not get any pay. He however admitted that Mr. and Mrs. Kuria were not present when he signed the computation form on 27.4.2013. He admitted that he was paid for the 13 days worked in March 2013, plus leave for 2002, 2003 and 2012. He further admitted that there are days he was off duty and as such, he never worked overtime. He further admitted that he used to have one off day per week and if he worked, he was paid for the off days worked.

### **Defence Case**

10. Mr. John Kuria a Director of the respondent testified as Rw1. He stated that the claimant was his employee from 7.1.2002 in Dandora Branch before being transferred to the River Road Branch in 2010. He further stated that the Dandora Branch operates from 9 a.m. to 6 p.m. while River Road Branch operate from 8.00 a.m. to 5 p.m.

11. Rw1 further testified that the claimant conducted himself well until the time he was transferred to River Road when he started absenting himself from work after reporting without any good reasons. That whenever he was send to the store at Duboise Road, a distance of about 5 – 10 minutes, he would take even an hour. As a result, Rw1 gave him verbal warnings but he failed to change. Rw1 explained that on 13.3.2013, he and his wife arrived at the parking yard of the River Road shop at 9.00 a.m. and called the claimant over his phone to assist them off load cargo from the vehicle. He however refused to pick the calls forcing him to send his wife to the shop to check on the clamant but he was not there.

12. After a few minutes, the claimant came to the shop and when he went inside, he found him talking with his wife. When he asked him why he was not picking his calls he said the phone had no charge, yet he had just told his wife that he had left the phone at the shop. Upon realizing that the claimant was lying, he decided to terminate his employment because of his dishonest conduct and told him to wait for his dues to be computed.

13. He denied ever confiscating claimant's phone or telling him stay outside the shop and contended that immediately after dismissing the claimant, he left for Dandora where he has the main base. He contended that the claimant refused to go for his dues as directed but instead kept on requesting for a chance to report back to work until 27.4.2013 when the finally collected the same being Kshs.48,403 net of statutory deductions as full and final dues. The dues included salary for 13 days worked in March 2013. Accrued leave for 2002, 2003 and 2012 plus one month salary in lieu of notice. That the claimant acknowledged the amount as full and final payment of his dues. However, Rw1 contended that the payment of one-month salary in lieu of notice was erroneously described.

14. He denied the reliefs sought by the claimant and prayed for the suit to be dismissed. He produced payroll to prove that the claimants pay included 10% House Allowance. He further contended that the claimant went for leave in some years but in others he was paid cash in lieu. He denied that the claimant was working from 7 a.m. to 8 p.m. from 2007 to 2013 and contended that there are days he was on his annual leave or off duty one day every week. Finally, he denied the claim for compensation because there was a good reason for terminating the contract of service.

15. On cross examination, Rw1 maintained that he verbally terminated the claimant on 13.3.2013 and not 26.4.2013. He contended that the contract was verbal but he kept records of employment for the claimant. He admitted that he never served the claimant with written but only verbal. Rw1 stated that the claimant signed for the dues before Anne Mburu and in his presence and the clarified that he item indicated as Service Pay was an error and it ought to have been salary in lieu of notice.

16. Rw1 further denied the claim for leave for 2004 and 2007 and contend that the claimant went for the said leave. He further denied that the shop operated till 8 p.m. and contended that at times the shop extended for just a few minutes, in which case, the employees were paid for the overtime worked. He further denied the claim for compensation and maintained that the claimant was lawfully terminated on 13.3.2013 for absenting himself from work and lying about the reason for not picking calls.

17. Jacinta Wairimu Kuria, also respondent's Director testified as Rw2. She stated that they respondent has several branches and in 2013 she was stationed at the River Road Branch. She further stated that the claimant was transferred to River Road Branch in 2010 from Dandora Branch and started very well but from 2012 he started misbehaving by disappearing from shop without permission and when asked he lied that he was looking for change. That whenever he was sent to pick items from the store along Dubois street he would take hours in a journey of 5 o 10 minutes.

18. Rw2 testified that on 13.3.2013 she arrived at the shop at 9.00 a.m. with Rw1 but when they called the claimant to remove cargo from the vehicle he failed to answer. She then went for him at the shop but she never found him and the other employees. Never knew his whereabouts. She further contended that when the claimant returned to the shop he told her that he had left the phone at the shop and that is why he never picked her calls. However, when Rw1 came in and asked the claimant why he did not pick his calls, he responded that the phone had no charge.

19. As a result of the conflicting answers, Rw1 told him that his employment was over and is dues will be calculated. She however realized at 4 p.m that the claimant was till seated outside the shop and she told him that he had already been fired. She however contended that his dues were computed and paid by the Accountant. She contended that the claimant refused to collect his dues immediately and continued to plead with the Rw1 for reinstatement. She denied that claimant was working overtime and maintained that the shop was opening from 9.00 a.m. to 6 p.m. and not 7.00 a.m. to 8.00 p.m. She concluded by stating that 10% of the Claimant's pay was House Allowance.

### **Analysis and Determination**

20. There is no dispute from the evidence and submissions that the claimant was employed by the respondent from 7.1.2002 to 13.3.2013 when he was dismissed for gross misconduct. The issues for determination are:

a. Whether the termination of the claimant's contract of service was unfair.

b. Whether the reliefs sought should be granted

### **Unfair termination**

21. Under section 45 of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that the termination was grounded on valid and fair reason(s) and that it was done after following a fair procedure valid and fair reasons relates to the employees conduct, capacity and compatibility or the employer's operational requirements. Fair procedure on the other hand refers to the procedure of according the claimant a hearing before terminating his services.

### **Reasons for termination herein**

22. The reasons cited by the defence witnesses for the termination of the claimant's services were absence from work and dishonest conduct. The claimant denied the second offence but the first offence of absconding himself from his work station without permission was obvious. Rw1 and Rw2 found him absent from the shop, which was his appointed place of work. That was of valid reason for summarily dismissing him under section 44(4) (a) of the Employment Act. Consequently I return that the respondent has discharged the burden of proving and justifying the reason for dismissing the claimant from employment on 13.3.2013 as required by section 43, 45(2) (a) and 47(5) of the Act.

### **Procedure followed**

23. Under section 41 of the Employment Act, before the employer terminates the services of his employee on ground of misconduct, poor performance or physical incapacity, he shall explain to the employee, in a language he understands, and in the presence of fellow employee or shop floor union representative of choice, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representations for consideration before the termination is decided.

24 In this case, the foregoing mandatory procedure was not followed before terminating the claimant's contract of service on 13.3.2013. The burden of proving that such procedure was followed lies on the employer under section 41 (2) (c) of the Act but in this case I find that she has not discharged the said burden of proof on a balance of probability. Consequently, I return that the abrupt termination of the claimant's contract of service was unfair.

### **Reliefs**

25. The respondent denied the claim for reliefs sought contending that the claimant signed a settlement agreement on 27.4.2013 by which he discharged her from any further claims. She fortified the said contention by *Waandhish Limited Vs Elizabeth Masila & 4 Others [2009]eKLR* where Okwengu J. (as she then was) held that by signing a letter of termination and acceptance of a cheque of Kshs.56,852 as full and final payment of all money due to him from the appellant, entered into a compromise whereby the appellant was released from any further liability.

26. In this case, however, the court is of the view that the settlement agreement was not mutually negotiated and it did not contain all the claimant's entitlements. As stated by the claimant in his testimony, he went for his dues on 27.4.2013 and found the Accountant who gave him a form indicating his dues as Kshs.48,403 and required him to sign or else he would not be paid anything. Because of the family needs, he signed for the money but he was not satisfied and that is why he brought this suit.

27. In addition to the foregoing, the agreement according to Rw1, contained errors on the items paid and that in my view is a reason that weakens the respondent's contention that the settlement agreement dated 27.4.2013 discharged her from any further claims by the claimant. Consequently, I return that the claimant is not estopped from claiming the reliefs herein in addition to the sum paid to him on 27.4.2013. The foregoing view is fortified by *Peter Mwangi Maina Vs Equitor Bottlers Limited [2016]eKLR* where the court held that the parties never discussed the settlement agreement mutually and the employee promised not to sue for unfair termination.

### **Notice and compensation**

28. Under 49(1) and 50 the Employment Act, I award the claimant one month salary in lieu of notice plus 6 months' salary compensation for unfair termination. In awarding, the said compensation I have considered the claimant 12 years' service period plus the fact that he contributed to his termination through misconduct. The salary in lieu of notice is however cancelled by the Kshs.13,000 paid on 27.4.2013 but erroneously indicated as service pay.

### **Salary for March and April 2010**

29. The claimant was dismissed on 13.3.2013 and he admitted that he was paid salary for the 13 days worked in March as part of the dues paid to him on 27.4.2013. Consequently, the claim for salary for March and April 2010 is dismissed.

### **Leave for 2004 and 2007**

30. The claimant contended that he never went for leave in 2004 and 2007 and prayed for Kshs.13,000. However, the respondent contended that the claimant was paid for the years he never went for leave. No leave records were produced by the respondent, as the custodian of Employment records, to prove that the claimant utilized his leave days for 2004 and 2007 or he was paid for the same. Consequently, I grant the claimant leave at the rate of 21 days per year as provided by section 28 of the Employment Act.

