



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.2225 OF 2014

JOHN ONTERI MOMANYI.....CLAIMANT

- VERSUS -

MOTOR BOUTIQUE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 15.12.2014 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. The declaration that the claimant's dismissal from employment was unlawful and unfair.
- b. The respondent to pay terminal benefits and compensation thus:
 - i. One month pay in lieu of notice Kshs.21, 783.00.
 - ii. Unpaid salary for March 2012 Kshs.21, 783.00.
 - iii. Damages for illegal and unfair termination 12 months' gross salaries Kshs. 261, 396.00.
 - iv. Total Kshs. 304, 962.00.
- c. Interest from the date of filing suit till payment in full.
- d. Costs of the suit plus interest thereon.

The respondent's statement of defence was filed on 16.03.2015 through Kamwaro & Company Advocates. The respondent prayed that the suit be struck out for being frivolous, vexatious and an abuse of Court process. The respondent further prayed for:

- a. Award of counterclaim for Kshs. 21, 783.00.
- b. Costs of the suit.
- c. Any other award that the Court deems fit to grant the respondent.

The respondent employed the claimant as a shop assistant from 03.03.2005 to 15.03.2012 at a salary Kshs. 21, 783.00 per month.

The claimant testified that on 15.03.2012 he was on sick leave and the respondent's supervisor one Peter Kagera called the claimant to convey that the respondent's director had given instructions that the claimant should not report on duty until he was recalled back. The claimant had inquired about the reason and was informed that a customer had called to report that the claimant sold the customer a smaller battery instead of the larger one that the customer had wanted to purchase at the price the customer had paid. Thus the claimant had been summarily dismissed. The claimant's case was that the summary dismissal was unfair for want of due process of a notice and hearing under section 41 of the Employment Act, 2007 and want of a valid reason as at the time of dismissal as per section 43 of the Act. The claimant

denied that he was culpable as was alleged against him. Upon cross examination the claimant contradicted himself as follows:

- a. In paragraph 4 of the memorandum of claim he stated that on 15.03.2012 he was on sick leave but in testimony changed that he was on normal off day.
- b. He denied his pleading in paragraph 4 of the memorandum of claim that on 15.03.2012 Peter called him and told him that he was not to report until further notice.
- c. Paragraph 5 of the claim states a customer was sold a battery with wrong specifications on a material date the claimant was on duty but in his testimony the claimant denied that account and testified that on the date the battery was sold, he was on off and therefore not at work. He then contradicted himself and testified that on the day the battery was sold he was at work and that he was the one who had served the customer in issue and thereafter on the following day he was called not to report at work.
- d. The claimant testified that the respondent's human resource office one Amos Momanyi was his brother and had advised him to file suit as matter would not be resolved by respondent. While making that testimony, the claimant again contradicted himself in stating in re-examination that it was Amos (and not Peter as pleaded) who called him and told him that the Director one Kamlesh had decided that he should not report at work.

The Court returns that the claimant's contradictory evidence and case cannot be trusted.

The respondent's General Manager one Kamlesh S. Chitroda (RW) testified. His evidence was that a customer known as Steve Muturi bought a battery and for unexplained reasons, he was given a manual receipt instead of the electronic receipt which showed the prices and model or specifications of the battery. Manual receipts were used only in event of power failure but which had not been reported in the instant case. The manual receipt overpriced the small battery given to the customer who later complained and was given the correct bigger battery for the price he had paid. RW found the customer arguing with the respondent's employee known as Peter Kagera and the customer told RW the story. The issue internally was why he was overcharged and electronic receipt not issued. Peter and the claimant had jointly served the customer. The claimant was the one who had issued the manual receipt. RW informed the human resource manager to handle the case. Peter and the claimant then left the shop to avoid the disciplinary case. They refused to come to the office to discuss the case. Peter left the shop unattended on that date the customer reported the complaint on over-charge.

The Court returns that the respondent's evidence was coherent and clear. The claimant voluntarily absconded duty and refused to avail himself for disciplinary process after the customer made the complaint. The Court reckons that the claimant admitted that the respondent's human resource manager was the claimant's brother, he admits that he discussed the case with the brother, and the Court returns that other than the formal processes of the disciplinary process, the claimant must have enjoyed that fraternal relationship and cannot turn around as claimed in the present suit. As submitted for the respondent, **"The only logical conclusion that one could reach from the conduct of the claimant is that the claimant indeed intended to swindle the customer and by extension defrauded the company with intent to enrich himself unlawfully."** The Court returns that the claimant deserted duty without notice and the counterclaim will succeed as per section 35 of the Act. The respondent filed submissions belatedly and therefore each party will bear own costs of the suit.

In conclusion judgment is entered for the respondent against the claimant for:

- a. Dismissal of the claimant's suit.
- b. Payment by the claimant to the respondent of **Kshs. 21, 783.00** by 31.12.2018 failing interest at Court rates to be payable thereon from the date of filing the counterclaim until full payment.
- c. Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 23rd November, 2018.

BYRAM ONGAYA

JUDGE