



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1956 OF 2014**

**PETER KITHAKA MBAWA.....CLAIMANT**

**VERSUS**

**COCA COLA JUICES KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues plus compensation for unlawful and unfair terminating of the claimant's contract of employment by the respondent. It is the claimant's case that he was dismissed for no good cause and without following the procedure provided under section 41 of the Employment Act. The respondent has denied the alleged unfair termination of the claimant's employment and averred that the claimant was fairly and lawfully dismissed for misconduct and after being accorded a hearing. She therefore denied the reliefs sought by the suit and prayed for the suit to be dismissed.

2. The suit was heard 23.3.2017 and 11.4.2018 when the claimant testified alone and the respondent called his HR Manager as the only defence witness. After the hearing, the parties file written submissions.

**Claimant's Case**

3. The claimant testified that he was employed by the Respondent in August 2004 as a driver/messenger in HR Department and late he was promoted to Process Technician from 14.1.2005 and his last salary was Kshs.65,299/=. He worked until 14.3.2014 when he was terminated on allegations of breach of company's security procedures on 11.3.2014 while on the night shift.

4. He further testified that on said day, he requested his wife to bring food to him at the work place but surprisingly when she did so she was escorted to the office by the security officer without his knowledge. He then took his food to eat at the canteen after which he escorted his wife. However, at the gate he was told by the security guards that he couldn't leave the compound citing instruction from the management. As a result, he went back to the office with his wife and worked until 9.00 am the following morning when he was called to the Board Room.

5. The claimant further testified that when he got to the board room, he found John Mathyaka (Manufacturing Manager), Christine Kagwira (HR Manager) and Fredrick Opondo (Supplies Chain Manager) looking agitated and they asked him why he had brought an intruder to the company. He answered them that the woman was not an intruder but his wife who had been escorted by a security guard to the office. After the said explanation, he was told to leave.

6. At 5.40 pm the same day he received a call from his immediate supervisor telling him not to report to work until further notice. On 14.3.2014 the HR called him over the phone to go to her office and on arrival, she gave him a termination letter. He denied the reasons cited for the termination including the alleged breached security procedures and contended that he had no security duties in the company. He also contended that he had no control of access to the company or recording visitors on the visitors' book at the gate. He maintained that it is the security people who are responsible for entry into the company. He further contended that the visitor was his second wife who she had not been updated on his personnel records because the respondent's policy did not allow more than one wife.

7. He further testified that during the meeting on 12.3.2014 at 9.00 am, he was not given any opportunity to raise any question to the chief supervisor, Mr. Moses Mbaka because he was not present in the meeting. He further contended that he was not allowed have any witness or representative in the meeting of 12.3.2014. He also contended that the Respondent didn't follow the code of conduct in his case when she failed to accorded him a fair hearing before dismissing him. He however, admitted that after the termination, he was paid pension, leave days, and salary for days worked but prayed for the reliefs sought in his memorandum of claim.

8. On cross examination, he stated that he had worked for the Respondent for close to 10 years before the termination. He confirmed that the respondent was producing Juices and that he was familiar with the procedures of getting into the production area. He further confirmed that he attended training on code of conduct because of the sensitivity of the production since it was possible to contaminate the production plant. He also confirmed that he was aware that any visitor must be authorized to enter the plant and was required to wear protective clothing while entering the plant.

9. He also confirmed that the company operated a canteen for serving food to staff but he stated that there was no requirement for all staff to eat at the canteen. He contended that it was the first time his wife Purity brought him food at work and admitted that the company had no record of her. He maintained that the wife followed the required procedure to enter the company.

10. He admitted that he went through a hearing on 12.3.2014 during which he was asked about the incidence and his defence was that the visitor was his wife. However, he contended that he was not given opportunity to explain himself. He further admitted that he was paid salary, leave, salary in lieu of notice, off days and pension. Finally, he admitted that the company used to deduct NSSF and NHIF from his salary.

### **Defence case**

11. M/s Christine Kagwiria testified as Rw1. She confirmed that the claimant was employed by the respondent on 20.8.2004 as a Messenger/Driver before being promoted to the position of Maintenance Technician in the Production department where he served until 14.3.2014. She further contended that his contract of service was subject to the respondent's Code of Business Conduct, Rules and Regulations. She further stated that the claimant was fully aware of the said code of business Conduct and regulations because he read and signed the same when he signed his contract of service and further attended routine trainings on the same including on 21.11.2013.

12. Rw1 further testified that on 12.3.2014, the night shift Supervisor reported that the claimant had allowed a female visitor into the respondent's production Plant during the working hours without lawful authority. Rw1 contended that the said action by the claimant was contrary to section 2.8 (a) of the company's HR policies and Procedure manual as well as breach of the respondent's security policies and procedures. She further contended that the visitor neither signed the visitors' book nor filled the visitor's questionnaire before entering the plant on the night of 11.3.2014.

13. Rw1 further testified that as a result of the said misconduct, the claimant was invited to a disciplinary hearing on 12.3.2014 to answer to the said misconduct of unlawfully bringing a visitor to the plant and neglecting his duty that night. She further testified that the claimant expressly admitted that he a lady visited him at the plant but explained that she was his wife Purity Mutio Mutunga. However, Rw1 contended that the only wife for the claimant known to the respondent according to the claimant's personnel records was Peninah Muthoni Mburia.

14. Rw1 concluded by stating that the claimant's explanation was found to be unsatisfactory and he was terminated on 14.3.2014, and on the same day he was paid all his lawful dues including salary in lieu of notice. She therefore contended that the claimant was validly terminated after following the respondent's disciplinary procedure set out in the HR Policy Manual, law and the rules of natural justice and prayed for the suit to be dismissed.

15. On cross examination, Rw1 contended that the claimant was invited to the hearing with a witness but he attended alone. She further contended that she spoke to female visitor. Finally, she maintained that the claimant received his terminal dues including salary in lieu of notice.

### **Analysis and Determination**

16. After careful reading and considering the pleadings, evidence and rival submissions, there is no dispute that the claimant was employed by the respondent at a Juice Production Plant as Process/Maintenance Technician until 14.3.2014 when he was terminated The issues for determination are:

- (a) Whether the termination was wrongful and unfair
- (b) Whether the reliefs sought by the claimant should be granted.

### **Unfair termination**

17. Under Section 45 (a) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A reason is fair if it relates to the employees' conduct, capacity and compatibility, or the employer's operational requirements.

The procedure is fair if it complies with section 41 and 51 of the Act, which entails, granting of the employee a hearing before termination and the post termination procedures including right of appeal, payment of terminal and accrued dues and issuance of certificate of service.

### **Reason(s) for the termination**

18. The reasons cited for the termination herein according to Rw1 were, allowing a woman to visit him at the respondent's production Plant without authority while on duty during the night shift, and negligence of duty during that time. The claimant admitted that he invited the woman to bring him food at the workplace that night contending that she was his second wife. He did not secure prior authority from his immediate Supervisor before bringing in the visitor as required by Clause 2.8 of the respondent's HR policies and Procedure Manual. The

claimant further admitted that he left workplace for a while and when he returned, he was surprised to find his wife in there after having been escorted to the place by the security guards. He further said he went to the canteen to eat his wife's food after which he escorted her only to be denied exit by the security guards at the gate.

19. In my view the foregoing conduct by the claimant entitled the employer to believe that her security was compromised and that the claimant had neglected his duty by absenting himself from the place appointed for the performance of his duty as provided by clause 2.8 of the respondent's HR Policies and procedure Manual, on the one hand, and section 44 (4) (a) of the Employment Act on the other hand. I therefore return that the respondent has proved and justified the reason for terminating the claimant's employment contract.

20. The foregoing view is fortified by the Court of Appeal decision in *Samuel Kalomit Murkomen v Telkom Kenya Limited [2017] eKLR*, held that:

***“In determining whether termination of an employee was fair, a court ought not to substitute its decision for that of an employer. Its duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer.”***

21. The said precedent is based on of section 43 (2) of the Employment Act, which provides that:

***“43(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”***

#### **Procedure followed**

22. Rw1 testified that the claimant was accorded a hearing on 12.3.2014 before the termination was done on 14.3.2014. The claimant admitted that he was invited to hearing on 12.3.2014 at 9.00 am where he denied that his visitor was an intruder but clarified that she was his second wife who was bringing food to him. He however contended that he found the Disciplinary Panel looking agitated and he was denied opportunity to explain himself and to call a witness or representative.

23. None of the members of the panel testified herein to deny the allegations by the claimant. Never the less I find that the failure to have another employee present during the disciplinary hearing in the circumstances of this case never prejudiced the claimant's case in the face of such admission to the misconduct cited. There is no doubt that he was told his offence and thereafter invited to defend himself. There is further no doubt that he his defence was considered by the employer before the termination was decided. The said proceedings met the objective of the requirement of a fair hearing prescribed by section 41 of the Employment Act and the Rules of natural justice. Consequently, I return that the respondent has proved on a balance of probability that she followed a fair procedure before terminating the claimant's contract of service.

#### **Reliefs**

24. In view of the foregoing finding that the claimant has not proved that he was unfairly and unlawfully terminated, I decline to grant the claim for compensation and salary for the 13 years he would have worked before attaining the retirement age as prayed.

25. Finally the claim for service pay is also declined because the claimant was a member of a pension scheme and therefore disqualified from service pay by dint of section 35 (6) of the Employment Act.

#### **Conclusion and Determination**

26. I have found that the termination of the claimant's contract of employment was substantively and procedurally fair. Secondly, I have found that the claimant is not entitled to the reliefs sought in this suit. Consequently, I dismiss the suit with no order as to costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 23rd day of November , 2018**

**ONESMUS N. MAKAU**

**JUDGE**