



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 800 OF 2012

(Originally Nairobi Chief Magistrate's Court Civil Case No. 7 of 2010)

BENJAMIN PAUL MBALUKA.....CLAIMANT

v

MAKKI ASHRAF t/a

CHAMPION MEAT SUPPLY.....RESPONDENT

JUDGMENT

1. Benjamin Paul Mbaluka (Claimant) was employed by Makki Ashraf (Respondent) in his butchery in 1994.
2. On 6 January 2010, the Claimant commenced legal proceedings in the Chief Magistrate's Court alleging unlawful termination of employment and breach of contract (the suit was transferred to this Court on 4 February 2011).
3. On 17 October 2013, the Claimant filed an amended *Statement of Claim* after securing leave of Court, and the Respondent filed his Statement of Response on 2 December 2013.
4. The Cause was heard on 14 May 2015 and on 7 September 2016 when Nduma J took the Claimant's and Respondent's evidence. This Court took the evidence of the Respondent's last witness on 26 July 2018.
5. The Claimant and Respondents submissions were not on file by this morning (Court informed Claimant filed submissions on 16 November 2018 just before delivery of judgment).
6. The Court has considered the pleadings and evidence and identified the Issues for determination as, *whether there was wrongful termination of employment, whether there was breach of contract/statute and appropriate remedies/orders.*

Wrongful termination of employment

7. The Claimant's case was that his employment was wrongfully terminated on 9 June 2009 because he was not given reasons for the termination.
8. On the circumstances surrounding the separation, the Claimant testified that on 7 June 2007, the Respondent's wife (second witness) suspected him of having stolen meat and asked instructed him to remove the meat. She however did not search her and when he reported to work the next day, she instructed him to wait for the Respondent.
9. According to the Claimant, the next day, the Respondent kept him waiting until close of day and he went home and when he reported back on 9 June 2009, the Respondent without giving him a hearing, directed him to go home as his services were no longer required.
10. The Respondent on the other hand maintained that the Claimant absconded from work on 23 June 2009 after he asked him to explain why he had stolen meat and that he reported to the Labour Office the next day (copy of notification received by Labour Office was produced in Court).
11. He further testified that on 25 June 2009, Union officials visited him but they did not make a follow up.
12. The Respondent's second witness on her part narrated that on the material day she suspected the Claimant had stolen meat when she observed that his trouser had a bulge and that when she asked him to lift up the trousers, he ran away and on reporting the next day instructed

him to wait for the Respondent but instead he went away.

13. A Claimant alleging wrongful/unfair termination of employment has a low threshold burden to discharge by dint of section 47(5) of the Employment Act, 2007.

14. In this case, the Claimant insisted that the separation was on 9 June 2009 while the Respondent maintained it was on 23 June 2009.

15. The Respondent notified the labour office of the theft incident through a letter dated 24 June 2009. The letter was acknowledged by the Labour Office on the same day. He met with Union officials on 25 June 2009.

16. The testimony of the Respondent appear consistent and probable as to when the events leading to the separation occurred for it is even incomprehensible why the Claimant having admitted that he involved union representatives failed to call of the Union officials to corroborate his testimony as to the events leading to and immediately after the separation.

17. The Court finds that the Claimant has not discharged the burden imposed on him by section 47(5) of the Employment Act, 2007.

18. Compensation and pay in lieu of notice are therefore not available as remedies in this case.

Breach of contract

Leave

19. Although pleading leave for 2009, in testimony the Claimant stated that he was claiming leave not taken in 2006. However, he did not disclose whether he applied for the leave and was denied.

20. In light of section 28(4) of the Employment Act, 2007, the Court will not allow this head of claim.

Overtime

21. The records produced in Court show that the Claimant and the other employees were paid for overtime work, and the Court finds no sufficient reason to hold that the Claimant was not paid for overtime the 15 years he served the Respondent.

22. In any case the Claimant did not disclose the contractually agreed working hours or the prescribed minimum working hours in the sector the Respondent operated in.

Service pay/Gratuity

23. The Claimant was contributing to the *National Social Security Fund* and therefore is not entitled to *service pay* by dint of section 35(5) & (6) of the Employment Act, 2007.

24. If there was any other basis (evidential or legal) for severance pay/gratuity, the Claimant did not reveal the same in Court.

Salary for June 2009

25. The Respondent admitted that the Claimant was not paid Kshs 10,460/- on account of wages for June 2009. The Claimant is entitled to the wages as of right.

Conclusion and Orders

26. The Court finds and holds that the Claimant did not prove that there was unfair termination of employment as envisaged by section 47(5) of the Employment Act, 2007.

27. The Court in the event finds no merit in that cause of action and attendant remedies are dismissed.

28. The Court however finds that the Claimant is entitled to and is awarded

(a) Wages June 2009 **Kshs 10,460/-**

29. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 16th day of November 2018.

Radido Stephen

Judge

Appearances

For Claimant Ms. Munyange/Ms. Inimah instructed by Mbaluka & Co. Advocates

For Respondent Mrs. Okullo instructed by Jane Gachuiga & Associates Advocates

Court Assistant Njunge/Lindsey