



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 279 OF 2017**

**SAMUEL MWANGI WACHINGA.....CLAIMANT**

**VERSUS**

**ENDARASHA FARMERS CO-OPERATIVE SOCIETY.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein was employed by the Respondent as a loader/turnboy from 19<sup>th</sup> January 2012 earning an initial salary of Kshs. 6,000/- which gradually rose and stood at Kshs. 9,000/- at the time of dismissal on 4<sup>th</sup> April 2017. He was accused of falsifying milk weighing records for an unnamed farmer, allegations he averred were false. He asserted that was not given an opportunity to be heard before dismissal, the procedure of dismissal was unlawful, he was not formally informed of the subject allegations prior to dismissal and that the reason for dismissal was false, unreasonable, unjust and unfair. He thus sought payment of compensation for the unfair termination equivalent to 12 months salary and terminal benefits made up of the underpayments totalling to Kshs. 171,861/-; overtime of Kshs. 284,890/-; unpaid leave from June 2012 till April 2017 Kshs. 45,981.60; house allowance of Kshs. 90,203.97; service pay as he was not subscribed to any gratuity scheme for the 5 years he had worked. He therefore sought a declaration that the termination of the Claimant's employment by the Respondent was unfair/unlawful, payment of the sums claimed as terminal benefits, compensation for the unfair termination and costs of the suit.

2. The Respondent filed a defence in which it averred that the Claimant worked on casual basis and presented himself for work on a daily basis and that his duties entailed washing milk containers and sometimes loading the milk onto the vehicles. The Respondent averred that the Claimant worked from April 2012 till January 2014 when he left and he came back in December 2015 and worked till April 2017. It averred that the Claimant was found to have colluded with some known farmers to inflate their daily milk deliveries to the Respondent. It was averred that the Claimant was given 2 verbal warnings for conspiring to inflate the amount of milk member number 2582 and member number 3411 had delivered. The Respondent denied that the Claimant was not afforded as hearing and that on 6<sup>th</sup> April 2017 the Claimant wrote to apologize for his unlawful dealings. The Respondent averred that the procedure followed in dismissing the Claimant was proper, transparent, fair, reasonable and just, and the Claimant was not entitled to any compensation and that he should be surcharged for stealing from his employer. The Respondent in answer to claims for leave and overtime stated that the Claimant worked for 2 hours in the morning and 2 hours in the afternoon and could not claim any overtime or unpaid leave. The Respondent averred that the Claimant was not a full time employee and was not entitled to house allowance or service pay. The Respondent denied receiving any demand notice from the Claimant. The Respondent thus sought the dismissal of the claim with costs.

3. The Claimant testified and for the Respondent there was Charles Kingori Gichuki and Peter Munoru Wanderi. The Claimant testified that he was employed as a turnboy/loader and that he used to collect milk and drop it at KCC and Kiganjo. He stated that he was not given any verbal warnings and was not called for any meeting prior to dismissal and that he could not recognize the members he is said to have altered production for. He said that he worked continuously without a break from 6.00am to 6.00pm or from 2.00am to 7.00pm and that for about 5 months there were days they worked from 2.00am till 9.00pm, that he was not called for the meetings held and that he was told what to write in the apology letter. In cross-

examination he denied that he worked for 2 hours a day cleaning milk cans. He admitted that he was studying in 2014 to 2015 at Thika. He stated that he would go for 6 months and would work in the short and long holidays. He was questioned on the time worked and he denied that he did not work during the period he was in school. He suggested that the minutes of the society were possibly made up and that he did not attend the meetings. He stated that he had gone to the labour office and that he did not have a document to show that he went to the Labour Office. He testified that he was forced to write the letter of apology with a promise of re-employment. He admitted that he did not write a letter denying the apology letter. He stated that he was underpaid and that the rate per day was about 500/-. In re-examination he stated that he went for study for 6 months in one year and 6 months the following year and that he was away for 8 months only and that he was told to write the apology letter if he wanted to be reinstated.

4. The Respondent's first witness testified that the Claimant was engaged as a casual who worked for the period when there was work available. He testified that the Claimant would clean milk cans and at times the floor. He stated that the Claimant's work was good until the Claimant began to accompany the vehicles for rounds and complaints came in regard to the recording of milk deliveries. He stated that they called the Claimant and enquired about the complaints and warned him in January 2017 and the Claimant apologized. He stated that they later had to summon the Claimant again on receipt of another complaint and the Claimant was called to appear before the board which deliberated and decided the services be terminated. He testified that the Claimant was employed as a casual when he presented himself and that there was a time the Claimant had gone for studies and was re-engaged after coming back.

5. The parties filed written submissions and the Claimant submitted that he was a term contract employee and not a casual. He relied on the provisions of Section 37 and 35(1) of the Employment Act. He cited the case of **Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited [2013] eKLR** and stated that he was employed for 5 years without a break and the nature of duties were such as could not be completed in 3 months. He cited Section 41 of the Employment Act and submitted that his termination amounted to unfair termination. He relied on Section 47(5) and 43 of the Employment Act and submitted that the dismissal was not in keeping with the provisions of the law. He submitted that according to the Respondent he was called for a disciplinary meeting captured in the minutes of 20<sup>th</sup> February 2017 which did not indicate that the hearing did not take place in the presence of another employee where the Claimant appeared before the board members and denied the allegations levelled against him. The Claimant submitted that the letter the Respondent relied on was written under duress. He submitted that his dismissal was malicious and the conduct of the Respondent calculated. He submitted that the reason for the dismissal was not proved, he thus sought the award of the prayers in his claim plus costs of the suit.

6. The Respondent submitted that the Claimant was engaged to clean cans for 4 hours a day and nobody assigned him the duty to accompany the vehicles to collect milk. It submitted that the Claimant did not work continuously as he took a break for 21 months between February 2014 and November 2015 when he went for studies. The Respondent submitted that the Claimant was given a hearing twice when the allegations were made against the Claimant and that the Respondent followed due process after the Claimant's betrayal of trust. The Respondent submitted that the Claimant accepted his mistakes and his letter of apology was not given under duress since he had no special professional or expertise knowledge he could take elsewhere and that his letter was a plea for re-engagement. The Respondent submitted that it had demonstrated that the Claimant was working for 4 hours a day and was paid and that did not make the Claimant a term contract employee. It was submitted that the process of disengagement was legal and procedural. The claim, it was submitted was without merits and should be dismissed with costs.

7. The Claimant was employed by the Respondent no doubt. The parties differ on the term. The Claimant asserts that he worked for 5 years without a break and that his contract of service converted to a term contract in terms of Section 37 and 35 of the Employment Act. He asserts that his dismissal was not in accordance with Section 41 of the Employment Act and in addition that he was coerced to write the letter of apology. The Respondent on its part asserts that the Claimant's services were dismissed procedurally and that the Claimant was not a term employee since he only worked for 4 hours a day. In his testimony, the Claimant stated that he went for studies in Thika for some time. He therefore cannot have worked continuously for 5 years without a break. He stated that he used to clean milk cans and also accompany

the trucks in collection of milk. That was a different role from that for which he was engaged in. He was summoned to a disciplinary hearing, was heard and dismissed. He wrote a letter of apology and in his pleadings he did not aver duress or coercion were employed to obtain the letter. He clearly admitted his culpability. It is not each hearing that is undertaken in compliance with Section 41 of the Employment Act that will have a witness for the employee present. Quite often, employees chose to go alone and the mere fact that there was no witness does not of itself invalidate the hearing. Even the absence of the letter of invitation to the hearing is not sufficient cause to disregard the process undertaken if the process is one that gave the employee an opportunity to be heard and present his defence. The Claimant's service was therefore procedurally terminated and there is no evidence the Claimant was entitled to recover what he pleaded for. The upshot of the foregoing is that the suit is unproved and unmerited and I dismiss it with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 4<sup>th</sup> day of December 2018**

**Nzioki wa Makau**

**JUDGE**