



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 123 OF 2014

STEPHEN MUTHURI MUTEA.....CLAIMANT

VERSUS

MERU MULTIPURPOSE CO-OPERATIVE LIMITED....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 29th June, 2017)

JUDGMENT

The claimant filed the statement of claim on 23.09.2014 through Mokua Obira & Associates Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the act of terminating the claimant's employment was unlawful, unfair and unprocedural.
- b) The respondent to pay the claimant's terminal dues in the form of gratuity, severance pay, and unpaid salaries.
- c) The respondent to pay the claimant salary for 12 months as damages for the dismissal.

The respondent filed the statement of response on 14.11.2014 through Kiautha Arithi & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant was employed by the respondent for 13 years having been employed by the letter of probationary appointment dated 13.08.1999 and to the position of Quality Control Clerk. By the letter dated 23.04.2002 the claimant was re-allocated duties at the maize mill dispatch and the relevant duties were stated in that letter. By the letter dated 06.05.2003, the claimant was appointed to take the duties of dispatch clerk from the holder of the office one Fredrick Kimathi was proceeding on annual leave. By the letter dated 01.05.2004, the claimant was transferred from maize mill section to Meru Safari Hotel as Food and Beverage Control Clerk with immediate effect. By the letter dated 25.10.2004, it was confirmed that the claimant had been transferred from the Hotel.

By the letter dated 13.03.2006, it was alleged that the claimant had flouted the procedure for weighing raw materials delivered to the respondent by weighing maize deliveries without the presence of the audit assistant to witness the same as required in the procedures. The claimant was asked to show-cause why disciplinary action should not be taken against him by 4.00pm on 13.03.2006. The claimant replied by his letter of 14.03.2006 admitting the allegations and stating that he was sorry and that he would not repeat the same. The claimant was accordingly cautioned by the letter dated 16.03.2006.

By the letter dated 28.05.2013 the claimant was notified that he had been relieved of the weighbridge

duties and left with only the stores duties for maize mill.

By the letter of suspension dated 04.06.2013 the claimant was suspended from duty at half pay pending appearance for hearing of the disciplinary case. It was alleged that more than once, maize had been stolen from the respondent's stores when there had been no allegations that the stores had been broken into and the claimant had been the person in charge of the stores' keys. It was also alleged that animal feeds and other products had been leaving the respondent's factory through the office of the weighbridge which the claimant manned through dubious means.

By the letter dated 02.07.2013 the claimant was invited to defend his case at the sitting of the management committee scheduled for 08.07.2013. The respondent addressed to the claimant another letter dated 09.07.2013 as follows:

“RE: LOSS OF TYRE

Reference is made to the loss of a new tyre for KAG 481N which was in your custody at the stores you were manning during the loss. The tyre was size GYR 315/80 R22.5 valued at Kshs. 56,236.80. This matter was raised during your appearance in the management committee meeting on 8th July 2013.

You accepted the responsibility and agreed to make good of the loss but you pleaded to be deducted in your salary spread over some months due to other commitment you had attached in your salary.

The Board directed you make a written prayer and commitment to the Manager on or before 10th July 2013 on how you intend to pay.

Kindly note.

Yours faithfully,

MERU MULTIPURPOSE CO-OPERATIVE SOCIETY LTD

SIGNED

(J.Bundi)

MILLS MANAGER”

The claimant replied by his letter dated 10.07.2013 stating that he be considered for payment for the tyre in 36 months so that he could have some salary to cater for his daily needs. He then concluded thus, **“May I say I was very sorry of what happened when I was in-charge and hope it shall not happen again.”**

The respondent's letter dated 12.07.2013 was directed to the claimant and it was about termination. The letter conveyed that in view of the suspension letter dated 04.06.2013 and the disciplinary hearing of 08.07.2013, it had been resolved that the claimant's services with the respondent be terminated with immediate effect. The accountant was directed to pay all the claimant's terminal dues but subject to the claimant's clearance with the respondent. At termination the claimant's gross pay was Kshs. 26, 647.00 per month.

The **1st issue** for determination is whether the claimant's termination was unfair. The evidence is clear. By the letter of suspension the claimant was notified about the allegations that were levelled against him and he was informed that he would be invited for a disciplinary hearing. The disciplinary hearing subsequently took place. Thus, the court returns that the claimant was afforded due process of a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. Subsequent to the disciplinary

hearing, the claimant wrote on 10.07.2013 stating that he was sorry about what happened when he was in-charge and pleaded that it would not happen again. As per the evidence by the respondent's witness and in view of the letter by the claimant dated 10.07.2013, the court returns that as at the time of the termination, it has been established that the respondent had a valid reason to terminate the contract of employment as envisaged in section 43 of the Employment Act, 2007 and on the ground that the claimant had failed to secure the stores as manifested in the case of the tyre he agreed to refund and the missing maize. The court returns that the claimant was given a notice and a hearing about the alleged misconduct or poor performance; and the respondent has established that there was a valid reason for the respondent to terminate the contract of employment. It is found by the court that the termination was therefore not unfair.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. As the termination was not unfair the court returns that the claimant is not entitled to the declaration and compensation as prayed for in that regard. There were no submissions on the prayers for gratuity, severance pay and unpaid salaries and the same are deemed abandoned as unjustified and not established by way of relevant evidence. The court finds that the claimant is not entitled to the half pay withheld during the suspension and follows the authority cited for the respondent by upholding its opinion in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus, **“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.”**

In the present case the termination has been found by the court not to have been unfair or unlawful and the claimant is not entitled to the salaries withheld during the period of interdiction.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

Signed, dated and delivered in court at Meru this Thursday, 29th June, 2017.

BYRAM ONGAYA

JUDGE