



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 262 OF 2016

FRANCIS WAWERU KARIA.....CLAIMANT

VERSUS

MOUNT KENYA BOTTLERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 16th June, 2017)

JUDGMENT

The claimant filed the statement of claim on 14.11.2016 through Warutere & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. General damages for unlawful dismissal.
- b. Outstanding dues as set out in the Pension Scheme Rules.
- c. One month's salary in lieu of notice at Kshs.47, 253.60.
- d. Unpaid leave for one year at Kshs. 47, 253.60.
- e. Costs of the suit.

Despite service, the respondent failed to enter appearance, to file a response or to attend the steps in the suit including at the hearing.

The claimant was employed by the respondent on 11.10.1991 as a water operator and the respondent issued the claimant with a job card dated 11.10.1991. The claimant was last deployed as an off-loading assistant.

By the letter dated 15.12.2015, it was alleged by the respondent that on 09.12.2015 the claimant had been assigned to load motor vehicle KBR 969Z and later the truck was found with 57 extra cases of 500 ml Fanta Orange on the way to deliver the products to a distributor. Thus, by that letter, the respondent suspended the claimant from duty and effective 16.12.2015 on half pay and pending investigations into the case.

By the letter dated 16.12.2015, the claimant was terminated from the respondent's employment on account of gross misconduct of loading the 57 excess cases of 500 ml Fanta Orange; said to be after

consideration of all written statements, response to show-cause and the claimant's submissions at the disciplinary hearing on 16.12.2015 having been found unsatisfactory. The termination was said to be effective 16.12.2015.

By the letter dated 17.12.2015, the respondent informed the claimant that the management had reconsidered the earlier decision and as the offence amounted to gross misconduct, the letter of 17.12.2015 superseded the letter of 16.12.2015 and the claimant was now dismissed from employment effective 17.12.2015.

The claimant's case is that the allegations were not established against him by the respondent and the dismissal was unfair for want of a valid reason.

Under section 43 of the Employment Act, 2007, the employer is required to prove the reason for terminating the contract of employment being the matters that the employer genuinely believed to exist as at the time of termination. Under section 47 (5) of the Act, the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer. The court returns that the respondent has failed to discharge that burden and the dismissal was unfair for want of valid or genuine reasons of the termination.

It was submitted for the claimant that it was inconceivable that suspension was effective 16.12.2015 pending investigation and at the same time a show-cause notice issued and a disciplinary hearing carried out the same day. The court agrees and returns that on a balance of probability, the dismissal was without a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. It was a dismissal devoid of due process.

As submitted, the claimant is awarded **Kshs. 47, 253.60** being a month's pay in lieu of termination notice, and maximum 12 month's pay for compensation for unfair termination making **Kshs. 567, 043.20** as was submitted. While making the award the court has considered the claimant's long service and that the claimant did not contribute to his dismissal but he desired to continue in employment. As the termination and summary dismissal letters promised outstanding dues as set out in the Pension Scheme Rules, the claimant is entitled accordingly. There was no submission and justification for prayer for pay for annual leave and the same is deemed abandoned.

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

1. The respondent to pay the claimant **Kshs.614, 296.80** by 01.08.2017 failing interest to be payable thereon at court rates from the date of the judgment till full payment.
2. The declaration that the claimant is entitled to payment of outstanding dues as set out in the Pension Scheme Rules.
3. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 16th June, 2017.**

BYRAM ONGAYA

JUDGE