



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 89 OF 2017

ISAIAH MWANIKI NDIRITU.....CLAIMANT

VERSUS

GATARAKWA FARMERS CO-OP SOCIETY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 17th November, 2017)

JUDGMENT

The claimant filed the statement of claim on 30.03.2017 through Warutere & Associates. 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. 9, 200.00.
- d) Unpaid leave for one year Kshs.9, 200.00.
- e) Costs of the suit.

The response to the statement of claim was filed on 30.05.2017 through Gachiru Kariuki & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant was employed by the respondent as a milk recorder effective sometimes in 1996. It is not in dispute that on or about 21.12.2016 the claimant was placed on compulsory leave from duty on allegations of loss of milk and mishandling of the lost milk tester gun. The claimant was subsequently terminated from employment by the letter dated 30.01.2017 with effect from 01.02.2017. The termination letter enumerated the reasons for termination as including many warning letters such as the one on 01.03.2004; being absent from duty on 30.04.2004; stealing a starter from store on 23.02.2006; failure to remit cash sale returns on 19.04.2006; failure to attend duty on 06.02.2009; suspension which was never lifted for stealing milk money and cheese; milk shortage on 19.08.2016; loss or adulteration of milk on 09.06.2015; loss of 1978 litres in 2016; loss of milk gun; loss of 23, 633 litres of milk between September 2015 to October 2016 worth Kshs. 732, 623.

The **first issue** for determination is whether the termination of the contract of employment was fair. At the time of the termination the claimant served as a driver following appropriate promotion. There is no established connection between his duties as a driver and the allegations as set out in the letter of compulsory leave. On that account the termination founded upon the letter of compulsory leave was

unfair for want of a valid or genuine reason as envisaged in section 43 of the Employment Act, 2007. The court further finds that the matters in the letter of termination purported to be the reasons or grounds for termination are not matters that the respondent had notified and heard the claimant about as envisaged in section 41 of the Act. Thus, the court returns that the termination was unfair in substance or procedure. The court considers that the wide ranging matters set out in the termination letter as reasons for termination show the respondent's predetermined intention to remove the claimant from employment at all cost and means. Further, the court returns that the respondent was not justified to revisit previous and stale disciplinary matters or grievances as reasons for termination. Finally, the evidence before the court failed to establish the specific reason the respondent relied upon to terminate the contract of employment. In any event the minutes of the alleged disciplinary hearing on 24.01.2017 were not on record.

The **second issue** for determination is whether the claimant is entitled to remedies as was prayed for. The court makes the following findings:

a) The claimant prayed for general damages for unlawful dismissal. The claimant had served for a long period of time. The court has considered the claimant's record of service which was not clean in view of the previously recorded warnings and instances of alleged misconduct. The court returns that 6 months' pay under section 49(1) (c) of the Employment Act, 2007 will meet justice in the case. At termination the claimant earned Kshs. 9, 200.00 and is awarded **Kshs.55, 200.00** accordingly.

b) No evidence and submissions was made about the claim for outstanding dues as set out in the pension scheme rules and the court returns that the prayer will therefore fail.

c) As there was no termination notice the court awards one month's salary in lieu of notice at **Kshs. 9, 200.00**.

d) The claimant is awarded unpaid leave for one year **Kshs.9, 200.00** as prayed for.

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

a) Payment of **Kshs.73, 600.00** by 15.01.2018 failing interest to be payable at court rates from today till full payment.

b) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 17th November, 2017**.

BYRAM ONGAYA

JUDGE