



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 87 OF 2016**

SAMUEL MUTETI KITHEKA .....CLAIMANT

VERSUS

SEIFEE BAKERIES [1968] LIMITED .....RESPONDENT

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 14/2/2015. The respondent denies the alleged unfair termination and avers that on 14/2/2015 the claimant's walked out of the workplace voluntarily and failed to report back to work.

2. The parties agreed to dispense with the hearing of witnesses and instead adopted their written statements and the exhibits filed and proceeded to dispose of the suit by written submissions. The parties also framed the issues for determination including whether the claimant was unfairly terminated and whether he is entitled to the reliefs sought.

**CLAIMANT'S CASE**

3. The claimant stated in his written testimony that he was employed by the respondent in January 2001 as a Bakery worker earning ksh.471 per day but paid on weekly basis. He worked until 2008 when his services were terminated by the respondent and all his dues paid. He however rejoined the respondent in December 2011 on fixed term contract basis which continually renewed until 14/2/2015 when he was terminated by reasons only known to the respondent. As at the time his salary was ksh.532 per day which equals to ksh.15960 per month.

4. He contended that the termination of services by the respondent was unfair because he was not served with any prior notice or hearing and also he was never accorded a fair hearing as provided by Section 41 of the Employment Act. He therefore prayed for the reliefs pleaded in his claim. He produced copies of his contracts of service plus letters by the labour officer Mombasa to prove that he lodged his complaint to the labour officer immediately after the termination

**DEFENCE CASE**

5. Mr. Muslimi Esmaji stated in his witness statement that he is the respondents' Director. He confirmed that the claimant was his employee on fixed term contracts the last one running from 1/1/2015 to

31/12/2015. He explained that due to reduction of work, he allocated work of packaging finished products on rotational basis between two groups which were to work apart of the week but received pay for a full week. The claimant was to work in one of the groups but be refused the arrangement and just walked away never to return. He however served demand letters thereafter alleging that he was unfairly terminated which was not true. The witness produced the contract of employment for 1/1/2015 to 31/12/2015 confirming that the claimants consolidated daily salary was ksh.532 payable on weekly basis. The contract to expire on 31/12/2015 but either party was free to terminate it before then by giving the other one month notice in writing or pay one month salary in lieu of notice.

### **ANALYSIS AND DETERMINATION**

6. There is no dispute that the claimant was employed by the respondent under a fixed term contract which was to expire on 31/12/2015. There is further no dispute that the contract was ended prematurely on 14/2/2015. The issues framed by the parties herein are:

- (i) Whether termination was procedurally and substantially unfair.
- (ii) Whether the reliefs sought should be granted.

### **Unfair termination**

7. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the claimant avers that he was terminated orally without any prior notice, warning or hearing as required under Section 41 of the Act. The respondent has however averred that due to reduced work, he changed the duty roaster and allocated the claimant of packaging finished products for a part of the week but pay him the pay equal to the whole week due to reduction of work but the claimant voluntarily walked away from the work place.

8. After careful consideration of the evidence before me, it is clear that there was reduction of work at the respondent's business and he had to reorganize his work force. He however did not do the reorganization in writing but verbally. Had he put things down in writing, it would have been easier for him to persuade the court to believing his story. However, without written evidence of deployment of the claimant from the bakery duties to packing, and that he was to work only a part of the week and earn whole weeks salary, I find on a balance of probability that he terminated claimant's services on account of redundancy. In my view it is impossible for an employer faced with reduced work to pay full salary to an employee who works for just a part of the week. On the other hand, I find from the letter from the labour officer after complaints by the claimant to corroborate the contention by the claimant that he was indeed terminated by the respondent and that he did not voluntarily desert employment.

9. Under Section 40 of the Act, termination of employment contract is prohibited unless it is done in compliance with the mandatory redundancy procedure provided. In this case redundancy procedure provided by Section 40 of the Act was not followed and that rendered the termination unfair. The respondent never served at least one months redundancy notice in writing and never did a fair selection process to identify the right persons for the lay off. She also never paid accrued dues plus severance pay to the claimant before the termination.

### **Reliefs**

10. The claimant is awarded kshs. 15960 being one month salary in lieu of notice plus ksh.159600 being 10 months salary compensation for unfair termination. In awarding the said compensation, I have considered the fact that the claimant was employed under a fixed term contract which had 10 months before expiring and as such he had the reasonable expectation to continue working and earning for 10 months were it not for the unfair sudden termination. The foregoing award defeats the claim for salary for the unexpired term of contract. The claimant will however get certificate of service in line with Section 51 of the Act. He will also have costs and interest.

Dated, signed and delivered this 17<sup>th</sup> November 2017

**O. Makau**

**Judge**