



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 494 OF 2014

BETWEEN

ALI OMAR FARAJCLAIMANT

VERSUS

MINI BAKERIES [MSA] LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Hezron Gekonde & Company Advocates for the Claimant

Muriu Mungai & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 10th October 2014. He avers he was employed by the Respondent Bakery Company, as a Trainee Bakery Manager, at the Respondent's Branch in Likoni Mombasa, on 23rd June 2007. He was promoted as the Branch Manager with effect from October 2007. He was summarily dismissed on 20th December 2013. His last salary was Kshs. 70,000 monthly. The Respondent alleged the Claimant was responsible for production of several underweight loaves of bread at Likoni Bakery. The Claimant feels termination was unfair and unlawful, and prays for Judgment against the Respondent for:-

a) 3 months' salary in lieu of notice at Kshs. 210,000.

b) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 840,000

Total.... Kshs. 1,050,000

c) A declaration that termination was illegal.

d) Costs and any other suitable relief.

2. The Respondent filed its Statement of Response on 7th November 2014 and an amended version on 16th July 2015. It is conceded the Claimant was employed by the Respondent as Trainee Bakery Manager,

on 23rd June 2007. He was employed as Likoni Branch Manager in October 2007. It is true he was summarily dismissed by the Respondent through a letter dated 19th December 2013. He was in charge of the Branch, as Branch Manager. The Assistant Operations Manager visited the Branch on 4th December 2013. It was discovered many loaves of bread were underweight. The findings were recorded in Bread Weight Chart on the same date. The Claimant was suspended. On 5th December 2013, stock verification exercise was carried out in the presence of the Claimant. It was found a number of goods and loaves of bread were missing. Further stock-taking was carried out on 10th December 2013. There was a shortfall of over 300 loaves of bread. Trainee Manager Vincent Oloo explained he inherited the shortfall from the Claimant, who had requested Oloo to cover up for the shortfall. The Claimant appeared before the Respondent's Management for disciplinary hearing on 18th December 2013. He was heard and decision to summarily dismiss him made. The decision was based on valid ground, and fairly carried out. The Respondent prays the Court to dismiss the Claim.

3. The Claimant gave evidence, and closed his case, on 26th September 2016. Senior Production Manager Omar Salim, Trainee Supervisor Abdikadir Mohamed Ali, and Personnel Administrator Consolata Kabau, all gave evidence for the Respondent on 16th June 2017 when hearing closed. The dispute was last mentioned on 21st September 2017 when Parties confirmed the filing of their Closing Submissions.

Claimant's position: -

4. The Claimant restated his employment history, and terms and conditions of employment. He oversaw production and distribution of bread. Senior Production Manager Salim visited Likoni Branch on 4th December 2013. He went straight to the bread weighing machine. He weighed bread and made records. He then asked the Claimant to sign the form, and left with the form.

5. On 5th December 2013, Senior Branch Manager visited the Branch. He carried out checks for an hour. The Senior Branch Manager asked the Claimant to hand over to Vincent Oloo as Senior Production Manager had found fault with bread stocks the previous day.

6. There was a stock taking on handing over. A report, exhibit 9 of Claimant's documents, revealed there was a shortage of 185 pieces of bread. Nothing else was missing. All Officers present signed the report. The Claimant was sent away on suspension.

7. He reported back expecting to be reassigned another Branch. When he returned, he was told other issues had cropped up when he was away. The Respondent advised there would be a discussion and way forward found. A meeting was called on 18th December 2013. Ali Hussein the overall boss chaired the meeting. The Claimant explained he transparently handed over on suspension, but was told on return, that there was a shortage of 300 pieces of bread. Vincent Oloo had also alleged the Claimant handed over to him with this shortage. The Claimant was told there was sufficient reason to terminate his contract of employment.

8. The Claimant explained during production, it was not unusual to encounter challenges. Sometimes, Employees ate bread without authorization. Trays could also fall down, damaging bread. This was Claimant's explanation for the 185 pieces found to have been missing before he went on suspension. He was surcharged for the loss from his salary. He was not aware of shortage of other loaves of bread.

8. Questioned by Advocate for the Respondent, the Claimant told the Court he kept custody of the loading book. This book captured the number of loaves leaving the Bakery. There was a record on 5th December 2013 for number of loaves which left the Bakery.

9. The Claimant was in the year 2012 suspended from employment. He was not able to recall if this was on account of falsifying mixing charts. He attended hearing on 18th December 2013. He did not know why he was attending. He explained himself on allegation made against him. He was asked to give a written explanation. He did not have a grudge with Vincent Oloo. The Claimant went to collect dismissal

letter in January 2014. He did not sign in acknowledgement. He was given a tabulation of dues. Redirected, the Claimant told the Court Audit showed 185 loaves of bread were missing. It was not shown that 400 pieces were missing. The Claimant handed over to Oloo with 185 pieces in shortfall. He was not aware who did cancellations on the loading book. The Claimant continued working after the suspension of 2012. He was surcharged for 185 loaves of bread. He revealed everything at the disciplinary hearing. Abdikadir was found to be untruthful.

Respondent's position:-

10. Omar Salim Abdilatif adopted his Witness Statement filed on 16th July 2015 as his evidence in chief. In recent times, the Respondent had received warning letters from the Kenya Bureau of Standard [KBS] about the weight of bread manufactured by the Respondent. Consequently the Respondent raised its level of scrutiny and inspection of its products.

11. On 4th December 2013, Assistant Operations Manager inspected products at Likoni Bakery. This was done in the presence of the Claimant. It was found that 120 pieces of bread produced in a single day, were underweight. The Claimant was suspended with effect from 5th December 2013. Omar did stock taking before the Claimant handed over to Vincent Oloo. There was a shortfall in the quantities of bread production ingredients such as wheat flour, polythene bags, and the actual loaves of bread. Omar carried out a second stock taking while the Claimant was on suspension, in the presence of Vincent Oloo. This was on or around 10th December 2013. It was discovered there was a shortfall of over 300 loaves of bread. Oloo explained that the shortfall was there even at the time the Claimant went on suspension. The Claimant had persuaded Oloo to cover up for him, until he returned from suspension. The value of the shortfall was deducted from the Claimant's salary. Omar was lastly invited to Claimant's disciplinary hearing, where he gave his evidence as above.

12. Cross-examined, Omar testified he did not know when the Claimant was employed. The Claimant left employment on 19th December 2013. He was suspended while he served as Branch Manager Likoni. There were loaves of bread manufactured at Likoni which were below the required weight. Stock taking revealed 187 loaves of bread were underweight. Omar did not find missing loaves initially. The Claimant was surcharged for the missing loaves. Small weight loss in baking is common. Employees were allowed to eat one loaf of bread in a day. It was possible some ate more than their rightful share. Omar did not recall any Employee was found stealing bread. There were cancellations in the stock records produced by Omar at the disciplinary hearing. Oloo and Ali said they did the cancellations. Omar stated on redirection that he visited the Bakery on 5th December 2013. The Operations Manager visited on 4th December 2013, and found underweight bread. Omar found 300 pieces were missing. He said the Claimant advised him to cover for him until he returned from suspension.

13. Abdikadir Mohamed Ali adopted his Witness Statement filed on 16th July 2015. He was acting Supervisor on night duty on 4th December 2013. He realized there was a shortfall in the loaves of bread. He informed Branch Manager the Claimant herein, who told Ali he was aware about the shortfall. Ali went to sleep in his house within the Bakery. The following morning, he was woken up by the Claimant, who told Ali that the Claimant had been instructed to hand over the Bakery by Omar Salim. This was after Omar Salim found there were underweight loaves of bread. The Claimant asked Ali to cover up for him until the Claimant came back from suspension. Ali declined to do so; fearing disciplinary action would be taken against him. The Claimant told him that the Claimant had spoken to Oloo about the issue, and that Oloo had agreed to cover up for the shortfall. Ali gave evidence at the disciplinary hearing on 18th December 2013.

14. Ali stated on cross-examination that the Claimant was his Production Supervisor at the beginning. The Claimant visited Ali at Ali's house, within the Bakery. He told Ali that Senior Production Manager Omar Salim had visited Likoni. The Claimant asked Ali to cover up for the Claimant, by not disclosing there was shortfall of loaves of bread. Omar Salim did not talk to Ali. Ali stated in closing his evidence, that it was his responsibility as a Supervisor, to raise alarm.

15. Consolata Kabau like her Colleagues adopted her Witness Statement as her evidence in chief. She confirmed that 120 loaves of bread were found underweight in a single day, the 4th December 2013. The Claimant was suspended effective 5th December 2013. Omar Salim conducted a second stock taking which resulted in a finding that over 300 loaves of bread were missing. Vincent Oloo revealed he was told by the Claimant to hide the shortfall until the Claimant returned from suspension. The Claimant was taken through a disciplinary hearing on 18th December 2013. He was summarily dismissed. The Claimant's terminal dues were computed in the Final Dues Clearance Form. The Claimant signed this Form.

16. Kabau testified on cross-examination that she did not write to the Claimant asking him to explain his position on underweight bread. The bread chart had cancellations. It was the Claimant who made the cancellations after stock-taking. He had hidden the loaves. Kabau was not present when stock was taken. Vincent Oloo was also found to have shortfall and surcharged. The Witness told the Court on redirection that KBS does not allow baking of underweight bread. On routine checking after the Claimant was suspended, 300 loaves of bread were found to be missing. This led to dismissal of the Claimant.

The Court Finds:-

17. The Claimant was employed by the Respondent Bakery as a Trainee Manager, commencing 1st June 2007, with a starting gross salary of Kshs. 18,000 monthly. He rose to become the Branch Manager at Respondent's Likoni Branch, earning a gross monthly salary of Kshs. 70,000. He was suspended on 4th December 2013, after Senior Production Manager visited Likoni, and found some loaves of bread were underweight.

18. Stock-taking done at the time of suspension revealed 185 loaves of bread were missing. The Claimant was surcharged for the loss. During suspension, further stock-taking found 300 loaves of bread missing. It was alleged these went missing during the presence of the Claimant, and he had asked his replacement, Vincent Oloo, to cover up the loss until the Claimant returned from suspension.

19. The Claimant was summarily dismissed after a disciplinary hearing which took place on 18th December 2013. The letter of summary dismissal is dated 19th December 2013. The effective date of dismissal is stated to be 20th December 2013.

20. Section 43 and 45 of the Employment Act 2007 require that the Employer has valid reason or reasons, to justify termination decision. Section 41 and 45 require the decision is arrived at through a fair procedure. Did the Respondent satisfy these standards of fairness?

21. The reason or reasons, for the decision is/are stated in the letter of summary dismissal- The Claimant was involved in cheating at the time he handed over to Oloo, on being suspended; there were 400 loaves of bread missing; the Claimant asked Oloo and Ali to cover up for him while on suspension; the Claimant misused Respondent's property contrary to the rules and regulations of the Respondent, in violation of Clause 6 [b] [vii] of the CBA and Section 44 [4] [g] of the Employment Act 2007; and lastly that the Claimant's behaviour resulted in loss of trust.

22. The Court has not seen any evidence of a Collective Bargaining Agreement which was applicable to the Claimant. None is contained in the bundle of documents availed to the Court, and none was alluded to, in the evidence given by any Witness. There is no basis to consider whether the Claimant violated the CBA mentioned in the letter of summary dismissal.

23. The assertion that 400 loaves of bread were missing is similarly not borne out in the evidence given by Respondent's Witnesses. The number given in the Statement of Response is 300 loaves of bread. When the Claimant took stocks on the date of suspension, there was no record made of 300 or 400 loaves of bread missing. The Claimant's position is there was a shortfall of 185 loaves, over which he was surcharged. It cannot be said with certainty, that the Claimant concealed the loss of 400 loaves of bread as alleged by the Respondent. This was not ascertained at the time the Claimant handed over to Oloo, and the number has not been consistently shown by the Respondent. The stock-taking revealing the shortfall

happened in the Claimant's absence. The Respondent had no reason to believe what explanation Ali and Oloo gave in the absence of the Claimant. There is every chance bread went missing after the Claimant was suspended. It was not safe to carry out second stock-taking in the absence of the Claimant. He had been involved in the first exercise, and handed over, with specific stock levels.

24. Omar Salim states in his evidence that the first stock-taking revealed shortfall in ingredients such as wheat flour and polythene bags. The shortfall also involved loaves of bread. The Claimant was suspended for 7 days, as a disciplinary sanction. He was also surcharged for the value of missing loaves. It was while under suspension, that the Respondent alleges the Claimant was found to have engaged in more profound acts of gross misconduct. This comprised loss of 300 or 400 loaves of bread, and the attempt to conceal loss by prevailing on Ali and Oloo to stay silent. The records compiled and presented by Omar Salim during the disciplinary hearing had cancellations. Salim told the Court cancellations were done by Ali and Oloo, while Kabau unconvincingly stated it was the Claimant who made the cancellations. It was important for the Respondent to take caution in relying on the explanation given by Ali and Oloo with regard to the missing bread.

25. In the view of the Court the Respondent should not have truncated its allegations against the Claimant, and treated the alleged loss of 300 loaves of bread, as separate from the initial allegations over which the Claimant was punished through a 7 day suspension without pay, and surcharged for loss of bread. The Respondent ought to have perhaps suspended the Claimant, not as a final disciplinary sanction, but as a matter of procedure, pending full investigation and disciplinary hearing.

26. The Court is not convinced that the Respondent had valid reasons, in dismissing the Claimant, after punitively suspending and surcharging him, only 7 days earlier, over the related issue of missing loaves of bread. Omar Salim in any event explained that Employees were allowed to eat a loaf of bread daily. Some ate more than their rightful share. Shortfall was usual. Why then assume that the Claimant was solely responsible for lost bread? Why did not the surcharge mechanism extend to the loaves discovered to be missing after the Claimant was suspended? The Court does not see why the Respondent resorted to the draconian sanction of summary dismissal, while the cost of 300 loaves of bread, or 400 loaves of bread if ascertained, lost or damaged in whichever way, could be recovered from the salary of a Branch Manager who earned Kshs. 70,000 monthly.

27. Was the procedure fair? The Claimant was suspended on 5th December 2013. He was to return to work after 7 days. Suspension as suggested above was not administrative suspension; it was a punishment for allegations the Claimant was presented with, on 4th December 2013. He was to return to work after 7 days, having served his time on suspension.

28. It is not clear from the minutes of 18th December 2013, if the meeting was intended to be a disciplinary hearing or an inquiry. Consolata Kabau is stated to have called the meeting in order that Ali Omar, Vincent Oloo and Abdulkadir confirm their statements which were recorded over the shortfall of loaves of bread. It was not indicated that the Claimant was under charge. No charges were read to the Claimant. It was not indicated if he was advised of his right to be accompanied to any disciplinary hearing by persons indentified under Section 41 of the Employment Act 2007. He was not accompanied by any such persons. At the end of the meeting the panel arrived at a conclusion. The conclusion was that the Claimant and Vincent Oloo were to write to the Respondent, showing cause why, they should not be dismissed. The letter to show cause followed the meeting of 18th December 2013, which suggests to the Court that the meeting of 18th December 2013 was not in strict sense a disciplinary hearing, but an inquiry after which a disciplinary hearing would be held.

29. In all, the Court finds the Respondent did not show valid reason or reasons, and failed in showing that fair procedure was followed, in terminating the Claimant's contract of employment.

IT IS ORDERED:-

a) It is declared termination was unfair

b) The Respondent shall pay to the Claimant the equivalent of 6 ½ months' salary in compensation for unfair termination at Kshs. 455,000 and 1 month salary in lieu of notice, at Kshs. 70,000- total Kshs.525,000.

c) No order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment, till payment in full.

Dated and delivered at Mombasa this 10th day of November 2017.

James Rika

Judge