



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 10 OF 2017**

**KENYA UNION OF COMMERCIAL,**

**FOOD AND ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**KASSMATT SUPERMARKET.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 15<sup>th</sup> December, 2017)

**JUDGMENT**

The claimant trade union filed a memorandum of claim on 17.01.2017 through Boniface M. Kavuvi, the union's Secretary General. The claimant alleged unfair or unlawful termination of its member being the respondent's former employee one Beatrice Karimi, the grievant. The claimant had started recruitment of the respondent's employees towards recognition and as at the time of the suit, 40% of the unionisable employees had been recruited. The grievant was enrolled as the claimant's member on 25.05.2015. The respondent employed the claimant as a shop assistant on 14.02.2012 and later promoted her to a cashier until termination on 04.09.2015. At the time of termination the claimant was paid Kshs.14,450.00 per month, all inclusive.

The grievant's case is that on 03.09.2015 a customer picked two items for purchase, a packet of NAN 1 milk and Aerial detergent 500g. The customer opted not to purchase the NAN 1 milk because she considered it to be more expensive compared to the respondent's other branch. The customers' queue was long and the grievant stated that she decided to keep it aside to return it to the shelves later.

On 04.09.2015 the grievant reported at work and she was summoned by the assistant manager and it was alleged that on 03.09.2015 she had sold the NAN 1 milk and she had pocketed the revenue. She denied the allegations and was referred to the director one Wilson Mwangi who upon seeing her told her that she was a thief and there was nothing to talk about since those who had told him that the grievant was a thief were not children. The grievant testified that the director then ordered her to go home thereby terminating the employment contract.

The union filed a trade dispute and the conciliator by the letter dated 01.09.2016 reported that the respondent refused to co-operate and the union was at liberty to refer the dispute to the court.

The claimant prayed for judgment against the respondent for reinstatement; damages for loss of earnings from the date of verbal termination; one month pay for wrongful accusation; interest; or in alternative, an order of separation from the date of termination; a month's pay in lieu of termination notice; pay for leave days due and not taken; compensation for loss of employment under section 49(1) (c); interest; costs; and any other or further relief that the honourable court may deem fit and just to grant.

The statement of defence was filed on 15.05.2017 through Ndungu Mwaura & Company Advocates. The respondent's case was that on 03.09.2016 the grievant sold the NAN1 milk item and pocketed the revenue. The revenue and the item were missing at the close of business that day and on reviewing the CCTV camera and the till, it was found that the revenue and the item were missing and she was dismissed. The claimant was heard before dismissal and therefore, the termination had been fair and the reason valid. The CCTV camera captured the incident and there was no reason to doubt her culpability.

The court has reviewed the parties' pleadings, evidence and submissions. The grievant has provided a clear contradiction in her account of the events of 03.09.2016. In her witness statement she says that the customer surrendered the item and she was to return it to the shelves. In that statement she does not give an account of how and when she then returned the item to the shelves. That gap remained at the end of her testimony. Instead she testified thus, **"The NAN1 was not in the system because I had not sold it. I was not shown the CCTV. I did not give NAN1 to another person and I did not pocket the cash"** It remains unclear where the NAN1 item went to if she did not sell it or give it to another person and at the same time she does not explain how and when she returned it to the shelves after, as she says, the customer surrendered it to her. Taking the grievant's evidence into account and the respondents' evidence that she sold and pocketed the revenue, the court returns that the respondent has established that it had a valid reason to dismiss the claimant namely, as at the time of the dismissal, the claimant failed to account for the revenue or the whereabouts of the NAN1 milk product she told the court, the customer had declined to purchase and surrendered it to her. There was no dispute that the claimant was heard prior to the termination and the court returns that the respondent substantially complied with sections 41 on notice and hearing and section 43 of the Employment Act, 2007 on valid reason for termination.

The issue of due and untaken leave days was not part of the dispute before the conciliator and there is no reason to doubt that leave due was paid every December and the claimant was paid all dues upon termination. In any event, there was no evidence of a grievance about leave throughout subsistence of the employment relationship. Thus, the court returns that the prayer for pay in lieu of annual leave will fail.

In conclusion, judgment is hereby entered for the respondent for dismissal of the suit with orders that the claimant will pay part of the respondent's costs now fixed at **Kshs.20,000.00**; and the declaration that the termination of the grievant's employment was not unfair.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 15<sup>th</sup> December, 2017**.

**BYRAM ONGAYA**

**JUDGE**