



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 210 OF 2015

(Before D. K. N. Marete)

JAPHET LUVAGA JAWASI.....CLAIMANT

VERSUS

MINI BAKERIES (NAIROBI) LIMITED.....RESPONDENT

JUDGEMENT

This matter is originated by way of a Memorandum of Claim dated 26th June, 2015. It does not disclose an issue in dispute on its face.

The respondent in a Respondents Reply/Defence to the claimants Memorandum Claim dated 27th July, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times of this cause he was an employee of the respondent as a labourer with effect from 15th May, 2003. He worked hard and diligently and as a consequence was promoted to the position of a Mixer with effect from 1st August, 2013. He earned gross salary Kshs.18,547.00 at the time of unfair termination of employment.

The claimant's other case is that he served the respondent with loyalty, diligence and full dedication until 30th August, 2014 when he was unfairly and procedurally terminated from employment with a refusal of payment of his terminal dues. This, he further avers, was on grounds of gross misconduct through failure to adhere to instructions that prohibited recycling of products (bread) and therefore causing massive bread shortfall. He was also not accorded an opportunity to dispute the same allegations.

He puts this as follows;

6. It is the claimant's case that his termination vide the notice of termination of Employment dated 30th August, 2014 contravenes the provision of Section 41 (a), 43, 44 and 45 of the Employment Act, 2007.

7. Section 41 (1) of the Employment Act 2007 verbatimly set out that when an employer intends to dismiss or terminate the employment of an employee from among other reasons misconduct, it must explain to the employee in a language he/she understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. It is the claimant's case that on the date of 1st September,

2014, the respondent summoned him to his office and handed a copy of termination of employment notice without prior reasons contrary to the aforesaid provisions of the law. The respondent never explained to the claimant the reason for the said termination from employment.

8. Section 44 (4) of the Employment Act entitles the employer to summarily dismiss an employee on the grounds among others misconduct. However the same provides that an employee should be given an opportunity to dispute the truthfulness or accusation leveled against him. The claimant submits that he was not accorded hearing before his termination this violates the provision of the Employment Act.

9. Section 43 (1) of the Employment Act obligates the employer to proof reason or reasons for termination failure to which the termination of employment is unfair within the meaning of Section 45 of the Employment Act, Section 45 (2) reads:

- a) That the reason for termination is valid;
- b) That the reason for the termination is a fair reason (s);
- c) That the employment was terminated in accordance with fair procedure;

He claims as follows;

I. Service benefits

17 days x yrs worked x basic x 30 days

17 x 11 yrs x 13,200 x 30 days *Kshs.82,280/-*

II. 3 months notice less one month notice given

Basic x Hse allowance x 2 months

13200 x 3960 x 17160 x 2 months *Kshs.34,320/-*

III. Leave dues 26 days x basic + hse x yrs worked ÷ 26

26 days x yrs worked

26 days x 10 yrs x 17160 ÷ 26 *Kshs. 171,600/-*

IV. Compensation for unfair termination

Gross pay x 12 months

18,547 x 12 *Kshs.222,564/-*

TOTAL **Kshs. 510,764/-**

In the penultimate he prays as follows;

- a) Declaration that the dismissal was unlawful, unprocedural and unfair and in the circumstance the claimant is entitled to compensation as prayed.
- b) The sum of Kshs.510,764/- as set out at paragraph 10 above;
- c) Certificate of service;

d) Cost of this suit and Interests on (b) above at court rates from time of filing this cause until payment in full and

e) Any other further and better relief the Honourable Court may deem just and fit to grant.

The respondent case is a denial of the claim. This is as follows;

8. In the alternative and without prejudice to the foregoing it is the Respondent's averment that if the claimant was in its employment which is denied, his contract of employment was lawfully terminated. That the contractual terms of engagement with the Respondent, all the relevant provisions of the Collective Bargaining Agreement and the law governing employment were fully complied with by the Respondent thus leading to the severance of contractual ties of employment between the claimant and the Respondent. The Claimant is estopped from pleading to the contrary having been terminated validly after undergoing fair procedural requirements.

9. Further to the Respondent's averment in paragraph (8) above, it is the Respondent's statement that upon the Claimant being served with a notice of termination of employment having been found to be guilty of gross misconduct, the Claimant absconded duty. That notwithstanding the Claimant's conduct, the Claimant received all his final dues and therefore freely executed a final dues clearance from required of the Claimant. The Claimant is given notice that the Respondent shall at an appropriate occasion counterclaim for payment of one month's salary in lieu of notice.

The matter came to court variously until the 28th July, 2017 when it was heard *inter partes*.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant at the hearing reiterated his claim as pleaded. He went on to adopt the contents of the claim and also vouched for its veracity. The claimant also adopted his witness statement dated 22nd February, 2017 in support of the claim.

The claimant in his written submissions set out and positively answered the following as his issues for determination;

- a) Whether the claimant was an employee of the respondent;*
- b) Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the Respondent;*
- c) Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment*
- d) Whether the claimant is entitled to an award of Certificate of Service and*
- e) Who should pay the costs and interest of the suit*

It is his submission that section 8 of the Employment Act, 2007 provides for both oral and unwritten contract in employment. This is as follows;

'The provisions of the Act shall apply to oral and written contracts'

Again, section 9 (2) of the Act comes out as follows;

“An employer who is a party to a written contract of service shall be responsible for causing the contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance to section (3)”

The claimant also sought to rely on the authority of **Edward Isedia Mukasia vs. Eldo Supermarket Limited (2015) eKLR** where this court, in support of a case for liability on the employer to produce employment records observed as follows;

Section 10 (7) of the Employment Act 2007 binds employers to proof terms of Employment in the event non – production of a written contract of Employment in all legal proceedings.

He therefore submitted a case of employment through and through despite the fact that he was issued with a letter of appointment on promotion to a mixer.

The claimant further relies on section 45 (1) and (2) of the Employment Act, 2007 to support a case of unfair termination of employment as follows;

45 (1) of the Employment Act provides that no employer shall terminate the employment of an employee unfairly

45 (2) A termination of employment by an employer is unfair if the employer fails to prove-

a) That the reason for termination is valid;

b) That the reason for the termination is a fair reason –

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

c) that the employment was terminated in accordance with fair procedure

The claimant further seeks to rely on the authority of **Moses Kaunda v Motor Group Ltd (2013) eKLR** the relied on the authority in **Walter Ogal Anuro v. Teachers Service Commission (2013) eKLR**;

‘That for a termination of employment to pass the fairness test, there must be both substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

It is his submission that there is no evidence of the allegation and accusation of recycling of bread and further that the letter of apology is a fraud concocted by the respondent to assist his case. He was indeed ordered to sign a blank sheet on which this letter was fitted. The respondent therefore falls short of offering any reason for termination and therefore the illegality of such termination.

The claimant further seeks to rely on the authority of section 41 (1) of the Employment Act, 2007 as approved in the authority of **Alphonse Machanga vs. Operation 680 Limited (2013) eKLR** as follows;

a) The employer has explained to the employee in a language the employee understands, the reason why termination is being considered.

b) The employer is allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during explanation.

c) That the employer has heard and considered any explanation by the said employee or their

representative.

d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary rules.

The respondent in his written submissions dated 20th May, 2016 brings out a case in support of the claim. It is his submission that the claimant's evidence that he was assigned the duties of a divider and not a dough maker by Mr. Hassan is not true. The position of a divider does not exist and in any event, Mr. Hassan Aboud denies authority to change designation of employees.

The respondent also denies a case of unfair termination of employment and submits that the claimant was taken through disciplinary proceedings whose minutes are dated 4th August, 2014. Here, he admitted misconduct and apologized and promised not to do that again. The respondent's position is that the claimant's evidence is untruthful and should be dismissed *in toto*.

This matter tilts in favour of the respondent. The testimonies of the parties at the hearing of this case and the respective cases of the parties support this position. This is because the evidence and overall case of the respondent overwhelms that of the claimant. On a test of preponderance of evidence, the respondent takes the day. I therefore find a case of lawful termination of employment and hold as such.

On a finding of a lawful termination of the employment of the claimant, he becomes disentitled to the relief sought. This answers the 2nd issue for determination.

I am therefore inclined to dismiss the claim with an order that each party bears its own cost of the claim. And this clears all the issues for determination.

Delivered, dated and signed this 11th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.
2. Mr. Siele Sigira instructed by Mr. Siele Sigira & Company Advocates for the respondent.