



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 43 OF 2017

(BEFORE D. K. N. MARETE)

JOHN KEBASO MOSE.....CLAIMANT

VERSUS

UCHUMI SUPERMARKET.....RESPONDENT

JUDGEMENT

This matter came to court vide a Memorandum of Claim dated 2nd August, 2017. It does not disclose an issue in dispute on its face.

The respondent in a Memorandum of Reply dated 18th October, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed and confirmed by the respondent on 27th November, 2009 as a Customer Service Attendant. This was after working as a casual labourer for three (3) years. He served as such until 23rd November, 2016 when he was dismissed from employment. He earned Kshs.38,500.00 per month at the time of termination.

The claimant's further case is that his stint of service was blemish free. However, on 18th October, 2016, the respondent raised an allegation of theft by servant against him whereupon he was arrested and detained at Kericho Police Station. These allegations were investigated with a finding of innocence and release by the police.

The claimant's other case is that on 20th November, 2016 he was dismissed from employment without being awarded an opportunity to be heard or even regard to his eight year blemish free stint of service. He avers that this amounted to gross violation of his right to personal dignity and psychological integrity all occasioning loss and damage. This is also an affront to his rights under section 41 of the Employment Act, 2007 and Article 28 of the Constitution of Kenya, 2010.

He prays as follows;

a. A declaration that the Respondent's verbal dismissal of the Claimant from his employment was unfair and unlawful, hence null and void.

b. That the conduct by the respondent to sign him a warning and dismiss him from his employment violated the Plaintiff's right as to personal dignity and then Claimant entitled to general damages.

c. The Respondent pay to the Claimant loss of Remuneration calculated at the rate of the Claimants Remuneration of Kshs.38,500/= per month to be paid between November 2016 until the date of reinstatement of employment.

IN THE ALTERNATIVE

- a. Three month's salary in lieu of notice.....Kshs. 385,000.00
- b. Maximum compensation of 12 month salary for Wrongful/unfair dismissal.....Kshs.462,000.00
- c. General damages for infringement of his Constitutional rights to dignity and psychological integrity.....Kshs.3,000,000.00
Kshs.3,500,000.00
- d. Interest at Court rates on, (a) and (c) above from the date of filing the claim
- e. Costs of this claim

The respondent's case is one of denial of the claim.

It is the respondent's further case that on 4th October, 2016, a guard, one, Cecilia Chepkoech who is an employee of the respondent's security firm reported that she had seen the claimant hurriedly exiting through to the respondent's receiving perimeter gate with an Uchumi carrier bag full of the respondent's merchandise. The claimant had also refused an inspection of the materials carried. This was reported to the respondent Internal Security and Human Resource Department by the said manager.

The respondent's further case is that upon report, the Internal Security Officer launched investigations by interviewing the external security guards, the claimant and reviewing CCTV footage for 4th October, 2016 which revealed the following;

- a. The Claimant was noted carrying unknown value of goodies in a shopper's basket and entering the Respondent's back office room.
- b. The Claimant was joined by another Respondent's employee named Lilian Chepchirchir internal security officer at the back office room where they packaged the goods in an Uchumi large carrier bag after switching off the lights.
- c. Lilian Chepchirchir proceeded to open the receiving perimeter gate.
- d. Thereafter the Claimants exited from the receiving perimeter gate in a hurry while carrying Uchumi Carrier bag full of goods.
- e. Lilian Chepchirchir locks the main gate and receiving area exit shutter door after releasing the Claimant with the loot.

It is the respondent's further case that before concluding the investigations, the claimant was notified of the same and accorded an opportunity to be heard and

make a presentation of his version of the story of theft but would not exonerate himself. A formal complaint was therefore made to Kericho Police Station who upon a review of the CCTV footage arrested the claimant on 18th October, 2016. She denies unlawful termination or a violation of the claimant's rights to employment or even summary dismissal.

The respondent's ultimate case is that on 21st October, 2016, the claimant tendered a resignation notice to the respondent. This was with a view to pursuing further studies on a full time basis. He handed over on 23rd November, 2016. Therefore, this is not a case of unfair or unlawful termination as the claimant's departure was personal and voluntary.

This matter came to court severally until the 13th October, 2017 when the parties agreed on a determination by way of written submissions.

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 did not file written submissions in support of his case.

The respondent in turn and in her written submissions dated 5th November, 2017 reiterates her case of no termination of employment. It is her submission that the claimant resigned from employment with effect from November, 2016 and therefore no case of termination arises in the circumstances. She buttresses his on the authority of **David K Cheruiyot vs. Barclays Bank of Kenya Limited (2015) eKLR** where Wasilwa, J. observed as follows;

“The question then is whether an employer once it has received a resignation letter can reject it. The employment contract just like any other contract has its own terms and conditions. Under the contract between the Claimant and Respondent, either party could terminate the contract by giving ample notice, in this case the period provided in the Collective Bargaining Agreement was 1 month. The Claimant exercised this option and it did not matter that there were on going investigations against him. An employer cannot be forced to remain in the employment of the employer if he does not wish to otherwise this would tantamount to breaching his freedom under Article 36 of the Constitution. Having found that the Claimant resigned, any action taken against him including a purported dismissal is null and void.”

The respondent further invokes the jurisprudence on resignation as applied in the authority of **David Njuguna v Registered Trustees of Sisters of Mercy t/a Matter Hospital (2015) eKLR** where Nduma, J. observed as follows;

“The Plaintiffs’ resignation having been accepted and taken effect the contractual relationship of an employer – employee had already been severed and so there was nothing to dismiss. The said alleged dismissal was therefore a purported dismissalIn law the relief of summary dismissal could only be available to an employer if the action is taken while the relationship still subsists. Herein, the relationship had ceased on 31st March, 2005. By 20th April, 2005 the cord had been severed and there *was nothing to dismiss.*”

The claimant has failed to proof and sustain a case of termination of employment in the circumstances. He has not in any way countered the case of resignation and therefore a case of lawful termination tendered by the respondent. All this time it was always his duty to proof unlawful termination as espoused by section 47 (5) of the Employment Act, 2007 as follows;

47 (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The employment contract is one comprised of terms and conditions of employment. These are laid out in black and white. In the absence of a write up of these terms and conditions, custom and convention would apply. It is not possible or proper to hold an employee to employment against his will. This would be tantamount to servitude and utterly illegitimate. It is not permissible in modern employment and labour relations exercise. The reverse, where an employee is forced on to an employer would not be tenable either. This is expected to be a free reign, on the will of the parties. This case is therefore a display of a case of no termination of employment. It therefore takes a bow from the onset. It fails. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he is not entitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 4th day of December, 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Nyandimo instructed instructed by E. K. Korir & Company Advocated for the claimant.
2. Miss Kitur holding brief for Gakii Mungania instructed by Gakii Mungania & Company Advocates for the respondent.