



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 218 OF 2014**

**FRANCIS NDIRANGU.....CLAIMANT**

**VERSUS**

**NAKUMATT HOLDINGS LIMITED.....RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim filed on 19<sup>th</sup> February, 2014, the claimant avers that he was employed by the respondent on 18<sup>th</sup> July, 2002 as a shop assistant and rose through the ranks until he became a supervisor on 22<sup>nd</sup> April 2011.
2. He worked in that position until 31<sup>st</sup> May, 2013 when he received a dismissal letter from the respondent. The claimant averred that the allegation that he stole from the respondent company were baseless and untrue hence his termination was unlawful.
3. The claimant therefore sought orders from the Court that a declaration issues against the respondent that the termination was unlawful and there be immediate reinstatement of the claimant to employment, payment of three months' salary in lieu of notice and damages for unlawful termination.
4. The respondent through its memorandum of claim filed on 26<sup>th</sup> March, 2014 refuted the respondent's claim and averred among others that the claimant was lawfully terminated for gross misconduct in that he was found red handed stealing the respondents property namely four bundles of cigarettes. The respondent therefore averred that the claimant was not entitled to the orders sought therefore the claim should be dismissed.
5. At the hearing of the claim the claimant reiterated most of the averments in the memorandum of claim but added in the main that he was employed by the respondent as a Deputy Supervisor in April, 2011. He further stated that he was invited to a disciplinary committee hearing on 24<sup>th</sup> May, 2013 where he was accused of theft and not misconduct as earlier notified. He further testified that he was asked to explain within 7 days about the negligence and did so by a letter dated 25<sup>th</sup> May, 2013. It was his evidence that in the letter of explanation he stated that he removed cigarettes and Red Bull from the store and took them to his area of work. A customer called him for assistance so he had to leave the items in his area unattended. According to him, he asked for forgiveness in his letter because he left the cigarettes unattended. Upon termination he was not paid his terminal dues. He was only paid for the month of May.

6. In cross examination he stated that his services were terminated contrary to the disciplinary procedure agreed between the respondent and his union. He further stated that he was alone in his area and that as a supervisor, there was nothing wrong with assisting a customer. He further stated that the five packets of cigarettes were hidden near the vegetables stand because he did not intend to block the gangway. He further stated that the items had a sensormatic sticker and hence was not easy to remove out without detection. He admitted that he had once been warned for sleeping while on duty.

7. He further stated that he was registered with NSSF and that he was a member of the respondent's staff pension scheme. He further admitted that he never cleared with the respondent although the letter of dismissal asked him to clear with the respondent before his dues could be paid.

8. The respondent on its part elected not to call any witness and Mr. Hassan for the respondent informed the Court that he would rely on the memorandum of response and the supporting documents.

9. From the evidence so far, the claimant does not seem to refute that he was called for disciplinary hearing. In his testimony before Court he was clear that he was called for disciplinary hearing and that he explained himself through a letter dated 25<sup>th</sup> May, 2015 where he asked for forgiveness and that he had no criminal intent at all. He further stated in his evidence that the reason he left the cigarettes unattended was because he was called by a customer for assistance and that he hid the cigarettes under the vegetable stand to avoid blocking the gangway.

10. The respondent opted not to call any oral evidence and invited the Court to rely on the documents filed in support of the respondent's defence. There are only three documents. The first one is a warning letter dated 25<sup>th</sup> February, 2013 asking the claimant to desist from sleeping while on duty, the second is an email dated 21<sup>st</sup> May, 2013 from one Hassan Radak to one Mr. Kimotho claiming the Head of Security had suspected the claimant had planned to steal cigarettes from the strong room. He swung into action and the claimant allegedly admitted to him that he collected five bundles of assorted cigarettes and gave only one to the cashier and hid four bundles as shown in photos allegedly attached to the email. There was a further email of the same date where Mr. Hassan informs Mr. Kimotho that all the video clips showing how the claimant hid the cigarettes were available. The third annexure was claimant own letter dated 25<sup>th</sup> May, 2013 where he states that he consents to performing an act of negligence but did not have a criminal mind at all. He proceeds to offer his unreserved apology allegedly as discussed during the sitting of the disciplinary committee meeting.

11. The claimant's termination letter states as a ground for termination, theft of company's property. The claimant in his response to the accusation of theft stated both in his letter to the disciplinary committee and in oral evidence before the Court that though he was negligent, he had no criminal intent. He further stated that his act of hiding the cigarettes under the vegetable stand was to keep them off the gangway when he was called by a customer for assistance. These were reasonable explanations by the claimant which required to be controverted by the respondent by calling or producing evidence implicating the claimant in the alleged theft. Besides the allegations of theft by Mr. Hassan contained in his email were quite serious and required him or the alleged Head of Security who informed him of the claimant's intended theft, to give evidence. This did not happen.

12. Reason for terminating an employee is usually measured against a standard of a reasonable employer. If taking the act or omission in issue into consideration, a reasonable employer would dismiss, then the Court will uphold the dismissal but if no reasonable employer would dismiss, then the Court will find in favour of the employee.

13. In the matter before me, it was not clear to the Court whether there was an attempt by the claimant to steal the cigarettes in issue. The explanation offered by the claimant was plausible and

required the respondent to call evidence to the contrary, especially the evidence of Mr. Hassan or the Head of Security. This did not happen. This therefore leaves doubt if the allegations of theft against the claimant were founded or not. To this extent, the Court finds that the claimant's termination was for unjustifiable and invalid reasons hence unfair. The Court therefore awards him 7 months basic salary as compensation for unfair termination. The Court further awards one month's basic salary in lieu of notice of termination. The respondent shall further issue the claimant with a certificate of service.

14. It is so ordered.

Dated at Nairobi this 26<sup>th</sup> day of February 2016

Abuodha J. N.

Judge

Delivered this 26<sup>th</sup> day of February 2016

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge