



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.186 OF 2015**

*(Before D. K. N. Marete)*

DAVID ONYANGO OKUKU.....  
.....CLAIMANT

VERSUS

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

**JUDGEMENT**

This matter was brought to court vide a Memorandum of Claim dated 9th July, 2015. The issues in dispute are therein cited as;

- a. *Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent;*
- b. *Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination as prayed for in this memorandum of claim;*
- c. *Whether the claimant is entitled to an award of certificate of service and*
- d. *Who should pay costs of the suit;*

The Respondent's Reply/Defence to the Claimant's Memorandum of Claim in a defence dated 24th July, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this cause, he was employed by the respondent as a mixer at the Eldoret Branch with effect from January, 2006. He earned Kshs. 20,280.00 at the time of his unfair and unprocedural termination. He was further not paid his terminal benefits.

It is the claimant's further case that he served the respondent with loyalty, diligence and full dedication until May, 2014 when his services were unfairly, unlawfully and unprocedurally terminated. Further, this dismissal contravened Sections 41, 44 and 45 of the Employment Act, 2007. He prays for;

i. *Three months pay in lieu of notice*

*Basic salary*

*20280 x 3 months*

*Kshs. 60840/=*

ii. *Severance pay*

*17 days x yrs worked x basic/30 days*

*17 days x 8 yrs x 20280/30 days*

*Kshs. 91,936/=*

iii. *Leave dues*

*26 days x 20280 x 8 yrs/26 days*

*Kshs. 162,240/=*

iv. *Rest days*

*4 days x months worked x basic/hse allowance*

*4 days x 100 months x 20280/30 days*

*Kshs. 270,400/=*

v. *Compensation for unfair termination*

*Gross pay x 12 months*

*20280 x 12 months*

*Kshs. 243,360/=*

**TOTAL**

**KSHS.828,776/=**

In the penultimate, he prays for;

- a. *A declaration that the termination was unlawful, unprocedural and unfair.*
- b. *The sum of Kshs. 828,776/- as set out at paragraph 11 above.*
- c. *Cost of this suit and interests on (b) and (c) at court rates from time of filing the suit until payment in full.*
- d. *Certificate of service as per Section 51 of the Employment Act and*
- e. *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent in a defence dated 24th July, 2015 denies the claim and prays that the same be dismissed with costs. It is the respondent's case that the claimant has never been in his employment and puts him in strict proof thereof. He also avers that the respondent is guilty of fraud and cannot plead further for want of particulars. This is as follows;

- a. *Claiming to have been employed by the respondent knowing that fact to be false.*
- b. *Committing forgery.*
- c. *Masquerading as the Respondent's employee.*

It is the respondent's further case that paragraph's 7, 8, 9 and 10 of the claim comprises of bad pleadings and the same be removed from the case and struck out altogether. She also denies ever being served with a notice of intention to sue or at all and submits that this matter is prematurely before court. She prays that the claim be dismissed with costs.

The matter came to court variously until the 27th November, 2015 when it was heard.

The issues in dispute in the circumstances are;

1. Whether the claimant was an employee of the respondent?
2. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who should pay costs of the suit?

The 1st issue for determination is whether the claimant was indeed an employee of the respondent. The pleadings, evidence and submissions of the parties on this are rivalry and conflicting. It is the claimant's case that he was employed by the respondent whereas the respondent denies this. The claimant in support of his case sought to rely on documents annexed to the claim and also the claimant's supplementary list of documents dated 7th October, 2015 and filed on 29th instant. These are;

- a. *A letter of calculation of terminal dues in respect to Mr. Peter Angira against Mini Bakeries Limited prepared by Josphat Ojwok, Branch Secretary, KUCFAW, Eldoret.*
- b. *A demand letter dated 11<sup>th</sup> June, 2015.*
- c. *Certificate of posting by Mwakio, Kirwa & Company Advocates to the respondent.*
- d. *A letter of appointment of Japheth Luvaga Jawasi.*
- e. *Job identification card.*
- f. *Collective agreement between the respondent and Bakery, Confectionary, Food Manufacturing and Allied Workers Union signed and dated 11<sup>th</sup> September, 2014.*
- g. *Collective agreement between the respondent and Bakery, Confectionary, Food Manufacturing and Allied Workers Union 1st May, 2014 to 30<sup>th</sup> April, 2017 signed and dated 11<sup>th</sup> September, 2014.*

The claimant reiterates these in cross-examination and written submissions. In his evidence, the claimant produces an original job identification card as exhibit no. 1.

The claimant further submits that he was in employment for more than three months and therefore relies on Section 9 of the Employment Act, 2007 which obligates an employer to reduce a contract of employment into writing as follows;

*“An employer who is a party to a written 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 with sub-section (3)”*

He further seeks to rely on Section 10 (7) of the Employment Act, 2007 which provides that;

*“Where an employer fails to produce a written contract in legal proceedings then the employer must prove or disprove an alleged term of the employment relationship.”*

Coupled with Section 74 of the Act which provides that employers should keep written records of all employees and in any event produce these in evidence as would be required, the claimant rests a case of negligence in compliance with the law on the respondent.

The respondent’s defence endeavors to contradict the evidence of the claimant but this fails miserably. The evidence of the claimant in support of his case overwhelms the defence. The defence as presented comes out as mere denial of the claimant’s case. On an application of the doctrine of balance of probability and preponderance of evidence, the matter tilts in favour of the claimant. In any event, the respondent was always duty bound to produce written evidence of the contract *inter parties*. I therefore find that the claimant was an employee of the respondent and hold as such.

The 2nd issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. It is the claimant’s case and submission that his employment was terminated on grounds of absenteeism. The respondent denies this and particularly denies that the claimant was in her employ.

The claimant sets out a case of unlawful termination and submits this was contrary to Section 45 (2) of the Employment Act as follows;

*A termination of employment by an employer is unfair if the employer fails to prove-*

- a. *That the reason for the 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 that*
- c. *That the employment was terminated in accordance with fair procedure*

He also seeks to rely on the case of **Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR** which emphasizes the requirements of substantive and procedural fairness in cases of termination and employment.

Section 45 (4) (b) of the Employment Act, 2007 provides as follows:-

*....that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.”*

He further sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

- d. *That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.*
- e. *That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
- f. *That the employer has heard and considered any explanations by the employee or their representative.*

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

The authorities cited by the claimant are all relevant but may be all inapplicable in the circumstances of this case. This is because having established a case of employment and there being no defence for termination of employment, I find a case of wrongful, unfair and unlawful termination of the employment of the claimant by the respondent. The defence in any event closed at a case of no employment by the respondent.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. Having succeeded on issues no. 1 and 2 above the claimant is entitled to the relief sought. I therefore allow the claim and order relief as follows;

i. One month's pay in lieu of notice Kshs. 20,280.00

ii. Three months salary as compensation for unlawful termination of the employment.

Kshs. 20,280.00 x 3 = Kshs. 60,840.00

**TOTAL Kshs. 81,120.00**

iii. That the respondent be and is hereby ordered to issue a certificate of service to the claimant.

iv. The cost of this claim shall be borne by the respondent.

**Delivered, dated and signed this 24<sup>th</sup> day of February 2016.**

**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.