



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.158 OF 2015

(Before D. K. N. Marete)

JOHANA KIPLIMO KOSGEI.....CLAIMANT

VERSUS

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

JUDGMENT

This matter was originated by way of a Memorandum of Claim dated 22nd June, 2015. It does not disclose the issue (s) in dispute on its face.

The respondent in a Respondent's Reply/Defence to the claimant's Memorandum of Claim dated 10th July, 2015 denies the claim and prays that it be dismissed with costs.

The claimants case is that at all material times to this case, he was orally employed by the respondent as a bread slicer with effect from January, 2005. He was attached to the respondents Eldoret Branch.

It is the claimants further case that he served the respondent with loyalty, diligence and competence until 1st July, 2014 when he was unfairly and un-procedurally, orally dismissed. The respondent also refused to pay his terminal benefits. It is the claimant's further case that he was terminated on the guise of an allegation that he and his colleagues wrongly packed bread in the crates. He avers that this was illegal and in contravention of Sections 41, 44 and 45 of the Employment Act, 2007. He prays for;

i. Three months pay in lieu of notice

Basic salary x 3 months

16640 x 3 months

Kshs. 49920/-

ii. Severance pay

17 days x yrs worked x basic/ 30 days

17 days x 9 yrs x 16640/30 days

Kshs. 84864/-

iii. Leave dues

26 days x basic x 9 yrs/26 days

26 days x 16640 x 9 yrs/ 26 days *Kshs.149760/-*

iv. Rest days

4 days x months worked x basic + hse allow/30 days

4 days x 109 months x 16640/30 days *Kshs.241834.67/-*

v. Compensation for unfair termination

Gross pay x 12 months

16640 x 12 months *Kshs.199680/-*

TOTAL

KSHS.726,058.67/-

In the penultimate, he prays for;

- a) A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated.*
- b) Kshs. 726,056/*
- c) Certificate of service*
- d) Cost of this suit and interests at court rates from time of filing the suit of filing until payment in full and*
- e) Any other further and better relief the Honourable Court may deem just and fit to grant.*

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

The issues for determination therefore 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 seeks to rely on documents annexed to the claim and also the claimants supplementary list of documents dated 7th October, 2015 and filed on 29th instant. These are;

- a) A gate pass with the name of the claimant.*
- b) 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.

c) Collective agreement between the respondent and Bakery, Confectionary, Food Manufacturing and Allied Workers Union signed and dated 7th November, 2014.

d) A demand letter dated 11th June, 2015.

e) Collective agreement between the respondent and Bakery, Confectionary, Food Manufacturing and Allied Workers Union dated 30th June, 2011 for the period 1st May 2011 to 31st April, 2014.

f) Collective agreement between the respondent and Bakery, Confectionary, Food Manufacturing and Allied Workers Union dated 11th September, 2014 for the period 1st May, 2014 to 30th April, 2017.

The claimant reiterates this in cross-examination and written submissions. 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)”

Section 10 (7) of the Employment Act further 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 job card tendered by the claimant as Exhibit No. 1 cannot be wished away as easily. Even on an application of the doctrine of balance of probability, which I would not wish to employ here, the claimant comes out closer. 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. This settles the 1st issue for determination.

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

The 2nd issue for determination is whether the termination of the employment of the claimant by the

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.