



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1049 OF 2014

PAUL MAKAU MUTUTU.....CLAIMANT

VS

NASIB INDUSTRIAL PRODUCTS.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 24th June 2014 and filed in Court on even date, the Claimant has sued the Respondent for unlawful summary dismissal. The Respondent filed a Response on 26th August 2014 but did not attend the hearing in spite of the date having been taken by consent at the Registry. The Court therefore heard the Claimant *ex parte* on 9th November 2015.

The Claimant's Case

2. The Claimant was employed by the Respondent as a Departmental Head from 14th May 2003 until 3rd February 2014. At the time of leaving employment his monthly salary was Kshs.16,400.00.

3. The Claimant states that on 29th January 2014, while at his place of work, he was called by the Respondent's Manager, Gurmukh Singh to the dispatch gate and asked to explain why a drum of standard thinner had been loaded to exceed its limit.

4. The Claimant explained to Singh that it was his colleague, John Ndeti who had filled the drum in the Claimant's absence. Ndeti admitted the mistake thus exonerating the Claimant from any wrongdoing. Nevertheless, both the Claimant and Ndeti were arrested and booked at Industrial Area Police Station where they spent two days and were later released without any charge.

5. Upon reporting to work on 3rd February 2014, the Claimant was instructed by the Respondent's Accountant, one Pamela to go and collect his letter from the Industrial Area Labour Office. He received no information at the Labour Office and upon going back to the office, he was issued with a dismissal letter dated 29th January 2014.

6. The Claimant claims the following:

- a. A declaration that his dismissal was unlawful and unfair
- b. Unpaid salary for the month of January 2014.....Kshs.16,400.00
- c. One month's salary in lieu of notice.....16,400.00

d. Leave pay for 10 years and 8 months (16,400x10).....	164,400.00
(16,400x8/12).....	10,933.00
e. Compensation for unlawful dismissal.....	196,800.00
f. Costs and interest	

The Respondent's Case

7. In its Response filed in Court on 26th August 2014, the Respondent states that the Claimant's work was to supervise and oversee all factory and production works including ensuring that all factory production, packaging and dispatch conformed to the applicable standards and agreed measures.

8. The Respondent further states that it had been established that the Claimant was colluding with other employees to steal the Respondent's products by excess packaging. On 29th January 2014, the Claimant and his colleagues were found to have stolen a measure of standard thinner. A report was made at Industrial Area Police Station but the Respondent chose not to pursue criminal charges. Following this incident, the Claimant was summarily dismissed.

Findings and Determination

9. The following are the issues for determination in this case:
- a. Whether the Claimant's dismissal was justifiable and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

10. The Claimant's dismissal was communicated by letter dated 29th January 2014 which states as follows:

“TO: PAUL MAKAU

RE: SUMMARY DISMISSAL

Following the incident that happened on 29/01/2014, in which you planned to steal from the company by filling drum of standard thinner with 40 litres more(sic) in which you admitted in your confession statement, the management has decided to summarily dismiss you.

You are hereby required to collect your final dues on 7/02/2014 from accounts office. Please make sure that you return all the company properties under your care including overall and shoes. You will not be paid unless you are cleared by stores.

Regards

(Signed)

Gurmukh Singh Panesar

Managing Director”

11. This letter gives the reason for the Claimant's dismissal as theft of 40 litres of standard thinner, an allegation that was denied by the Claimant both in his pleadings and sworn testimony. The Claimant told the Court that his colleague John Ndeti admitted having over filled the drum in issue.

12. Section 43 of the Employment Act, 2007 requires an employer to prove a valid reason for the termination of the employment of an employee and Section 41 of the Act provides the mandatory disciplinary procedure to be followed in cases of summary dismissal. Apart from the Respondent's averments in the Response filed in Court on 26th August 2014, no evidence was led to prove the charges leading to the Claimant's dismissal.

13. The letter of dismissal made reference to a confession statement by the Claimant which was not made available to the Court. The Court therefore finds that the Respondent failed to prove a valid reason for the termination of the Claimant's employment by way of summary dismissal. Further, there was no attempt by the Respondent to take the Claimant through the disciplinary process contemplated under Section 41 of the Employment Act. That being the case, the Court finds that the Claimant's dismissal was substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

14. In light of the foregoing findings I award the Claimant twelve (12) months' salary in compensation for unlawful dismissal. In making this award I have considered the Claimant's length of service and the Respondent's conduct in the termination process. I also award him one (1) month's salary in lieu of notice as well as salary for the month of January 2014.

15. The Respondent did not produce any leave records in opposition to the Claimant's claim for leave pay which therefore succeeds and is allowed.

16. Ultimately I make an award in favour of the Claimant in the following terms:

- a. 12 months' salary in compensation for unlawful dismissal.....Kshs.196,800.00
- b. 1 month's salary in lieu of notice.....16,400.00
- c. Salary for the month of January 2014.....16,400.00
- d. Leave pay for 10 years (16,400/30x21x10).....114,800.00
- e. Prorata leave for 8 months (16,400/30x1.75x8).....7,653.00

Total.....352,053.00

17. The Claimant will have the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

18. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY 2016

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JUDGE

Appearance:

Mr. Mulaku for the Claimant

No appearance for the Respondent