



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1275 OF 2011**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 3<sup>rd</sup> February 2016)**

**PIUS ALUKHABA MASENGO .....CLAIMANT**

**VERSUS**

**HAVELI RESTAURANT LIMITED .....RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant herein filed his Memorandum of Claim on 27.7.2011 through the firm of Ashimosi Shitambasi & Associates. He claims that he was employed by the Respondent from 1.1.2004 vide a contract of employment dated 2.8.2004. That he was employed as a Storekeeper.
2. He avers that he worked for Respondent until 30<sup>th</sup> April 2010 when he was terminated orally without notice. At the time, his basic salary was Kshs.12,833/=.
3. It is the Claimant's case that on this 2.8.2004 he was working in the laundry and the Managing Director told him that he should do cleaning work. The Claimant asked whether there was any problem and the Respondent became very harsh and demanded to know why the Claimant was asking him questions. He then verbally told him that he didn't want to see him anymore and also instructed him to leave the premises immediately.
4. The Claimant thereafter proceeded and sought help from his Advocate who wrote Respondent a demand notice.
5. It is the Claimant's submissions that he was wrongfully terminated without regard to the law as he was not afforded any chance to be heard and was also denied payment of his terminal dues.
6. He asks this court to grant him orders against the Respondent for reinstatement without any loss of pay privileges and also that he be paid damages for unlawful termination, terminal dues including 1 months pay in lieu of notice, severance pay, public holidays and weekends worked, overtime payment and leave travelling allowance.
7. The Claimant attached his appointment letter as Appendix 1 showing he was employed as a Storekeeper.

8. The Respondents filed their Response to the claim on 1.11.2011 through the firm of Pramod Patel Advocates. It is the Respondents position that it is indeed true that the Claimant was employed on 1.1.2004 as a Storekeeper but that the Respondent was free to assign him any other duties. The Respondent also avers that the Claimant could also be summarily dismissed for being absent without leave, refusal to perform duties or using abusive language or refusing to follow orders from management. That on 16.3.2010, he was assigned duties by the Respondent's managing Director to clean the kitchen and he refused without any reason and walked out of the Respondents business premises.
9. The Respondent avers that it was within their powers to assign Claimant duties of kitchen cleaning and Claimant refused to undertake the duties. Then on 5.5.2010, the Claimant's employment was terminated for absenteeism and absconding duties and these reasons were elaborated in a letter addressed to Claimant's Advocate in reply to his demand letter. The Respondent avers that the Claimant's action amounted to gross misconduct.
10. The Respondent also avers that the Claimant is not entitled to service pay as he was under the NSSF Scheme.
11. The Respondent have submitted that the dismissal was lawful and that the Claimant's case should be dismissed with costs.
12. I have considered evidence of both parties plus submissions herein filed. The issues for determination are as follows:
  1. ***Whether there were valid reasons to terminate the Claimant.***
  2. ***Whether due process was followed before the termination***
  3. ***What remedies if any the Claimant is entitled to .***
13. On the 1<sup>st</sup> issue, the Claimant explains that he was orally dismissed after he was asked to clean the kitchen and he questioned this approach.
14. The Respondent also admits that indeed the Claimant was assigned cleaning duties and he declined but adds that he then absconded duty.
15. To start with, the Claimant had been employed as a Storekeeper and this is evidenced from his appointment letter Appendix 1. Was it then right for Respondent to assign him duties not related to his work?. Section 10(5) of Employment Act states as follows:

***“Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”***
16. According to this Section, if any particular of the contract changes, this shall be done in consultation with the employee and it must be in writing. In the Claimant's case however, the Respondent decides to allocate Claimant duties outside his normal work schedule and without consultation and this was in breach of the express provisions of the contract and also the law.
17. The Respondent was wrong in assigning Claimant cleaning duties when he had been employed as a Storekeeper. Refusal to do the work assigned cannot therefore be termed as insubordination warranting summary dismissal.
18. The Claimant avers that the Claimant absconded. This I also find not to be true because the Respondent never issued the Claimant with any termination letter listing the reasons for the termination. They only stated the reason as being abscondment after being confronted with a

demand notice from Claimant's Advocate.

19. Under Section 43 of Employment Act:

**(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

20. The reason must have therefore been real reasons existing at time of termination and which caused the employer to terminate services of the employee.

21. This Court therefore finds that there were no valid reasons to terminate the services of the Claimant.

22. On the 2<sup>nd</sup> issue, due process envisaged and provided for under Section 41 of Employment Act 2007 which states as follows:

**“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”**

23. This process was never followed at all.

24. It is therefore this Court's finding that the dismissal of Claimant was unfair and unlawful under Section 45 (1) & (2) of Employment Act 2007 which states as follows:

1. **No employer shall terminate the employment of an employee unfairly.**
2. **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 employee's conduct, capacity or compatibility; or**
    - ii. **based on the operational requirements of the employer; and**
  - c. **that the employment was terminated in accordance with fair procedure.**

25. Having found as above, I find for Claimant and award him as follows:

1. **1 months salary in lieu of notice = 12,833/=**
2. **12 months salary as compensation for unlawful termination of employment = 12 x 12,833 = 153,996/=**

**TOTAL = 166,829/=**

3. *Claimant be issued with a Certificate of Service.*
4. *The Claimant being a member of NSSF is not entitled to service pay.*
5. *Respondent to pay costs of this suit.*

**Read in open Court this 3<sup>rd</sup> day of February, 2016.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Okao holding brief Pramod Patel for Respondent – Present

Claimant in person – Present