



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
CAUSE NO. 531 OF 2014

MARY MUTHONI.....CLAIMANT

v

KENYA NUT COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. Mary Muthoni (Claimant) commenced legal action against Kenya Nut Company Ltd (Respondent) on 22 October 2014, and she stated the issue in dispute as *unfair termination*.
 2. The Respondent filed its Response on 9 October 2014, which prompted the Claimant to file a Reply on 31 March 2015.
 3. The Cause was heard on 9 November 2015 when the Claimant testified. The Respondent opted not to call any witness(es) despite informing the Court at commencement of hearing that it had 1 witness.
 4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the termination of the Claimant's employment was unfair and if the answer is in the positive, appropriate remedies including entitlements not related to unfairness of termination of employment*.
- Whether termination of employment was unfair**
5. The Claimant challenged the termination of her employment on the grounds that she was not accorded a fair hearing before the termination and that there were no valid or fair reasons for the action.
 6. During her testimony, the Claimant admitted that a hearing was held and that before the hearing she recorded a statement with the Respondent.
 7. As regards the subject of the hearing, the Claimant stated that she had been found with about 2 litres of milk while leaving the work place at the end of day on 3 September 2014.
 8. The Respondent had filed minutes of a Disciplinary hearing held on 9 September 2014 which indicate that the Claimant and 2 Union representatives were present. However the minutes were not produced nor proved (see *Kenneth Nyaga Mwige v Austin Kiguta & 2 Ors (2015) eKLR*) on legal effects of failure to have documents admitted and proved).
 9. Despite the failure to have the minutes admitted/proved but relying on the admission by the Claimant,

the Court is satisfied that the process as conducted by the Respondent met the statutory standard as envisaged under section 41 of the Employment Act, 2007.

10. Pursuant to sections 43 and 45 of the Employment Act, 2007, the obligation to prove the reasons for termination of employment is upon the employer. The employer ought also to prove that the reasons meet the validity and fairness standard.

11. The reason given for the termination of the Claimant's employment in the letter of 10 September 2014 was *taking company properties without any lawful permission*.

12. This is the reason the Respondent had to not only prove but prove as valid and fair.

13. During cross examination, the Claimant admitted that she was found with *remnants* of milk. She had collected the same from various containers. She also admitted that she was not allowed to take the milk away.

14. Theft constitutes a valid reason for termination of employment under section 44(4)(g) of the Employment Act, 2007, and the Court finds that the Respondent has demonstrated as much through cross examination of the Claimant.

15. However, whether the action to summarily dismiss the Claimant under the circumstances obtaining herein was fair must also be examined.

16. The Claimant stated that the milk she was found with was what she had collected from the containers. She referred to the same as *remnants*.

17. According to her, she could not throw away food and she further stated that she had on prior occasions taken the milk with the full knowledge that she would be subjected to inspection at the gate when leaving.

18. The Respondent did not controvert the Claimant's contention that she had previously passed through the gates with *remnants* of milk.

19. The Respondent did not equally controvert the Claimant's assertions that she had collected from several containers, drops of milk.

20. Considering these 2 issues, the Court is of the view that the decision to terminate with immediate effect the employment of the Claimant was not fair.

21. The punishment or sanction was too severe in the circumstances and a warning may have been appropriate.

Appropriate remedies

Days worked but not paid

22. The Claimant sought Kshs 2,549/- on account of earned wages. The Respondent had provided for the same in the schedule of final dues summary. She is entitled to the same.

1 month pay in lieu of notice

23. Under this head, the Claimant sought Kshs 7,646/-. The Respondent had also worked out this as part of the dues and the Claimant is entitled to the same.

Severance pay

24. The Claimant was not declared redundant and would not be entitled to any statutory payment known as severance.

25. In any event she filed a Provisional Member Statement of Account from the National Social Security Fund and if by severance pay she meant service pay as envisaged under section 35(5) of the Employment Act, 2007, the same would not be available to her.

26. No contractual basis for gratuity was laid before Court.

Compensation

27. Compensation is a discretionary remedy and the Court's discretion is fettered by the factors outlined in section 49(4) of the Employment Act, 2007.

28. Considering that the Claimant served the Respondent for about 13 years, the Court is of the view that compensation equivalent to 10 months gross wages assessed as Kshs 76,460/- would be fair.

Overtime

29. Although pleaded, no evidence was led as regards overtime except the indication in the Respondent's schedule of final dues that the Claimant had 70 hours of overtime pay due.

Leave

30. Similarly, no evidence was led on the issue of leave save the indication that the Claimant had 10 pending leave days.

Certificate of Service

31. This is a statutory right and the Claimant should collect the same if she did not collect it at time of clearance.

Conclusion and Orders

32. Flowing from the foregoing, the Court finds and holds that though the termination of the Claimant's employment was procedurally fair and the reason valid, it was not fair, and the Court awards the Claimant and orders the Respondent to pay her

a. Earned wages	Kshs 2,549/-
b. 1 month pay in lieu of notice	Kshs 7,646/-
c. Compensation	Kshs 76,460/-
TOTAL	Kshs 86,655/-

33. The Respondent filed a copy of a cheque for Kshs 16,119/- purportedly paid to the Claimant. This document was not produced or proved. The Claimant was not asked in cross examination whether she received the payment.

34. If indeed the Claimant received the cheque, it would be inequitable and unfair to let her have double payment in respect of some of the heads of relief granted.

35. The Court therefore orders that the said payment be deducted from the award herein if the cheque was paid.

36. Claimant to have costs of Kshs 20,000/-.

Delivered, dated and signed in Nakuru on this 8th day of March 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Mr. Ngeno instructed by Kaplan & Stratton Advocates

Court Assistant Nixon