



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1167 OF 2014**

**COSMAS MUTUA MWANZIA.....CLAIMANT**

**VERSUS**

**BIO FOOD PRODUCTS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit against the Respondent on 15<sup>th</sup> July 2014 and sought resolution of a dispute he framed as unfair termination/dismissal and non-payment of terminal dues and compensatory damages. He averred that at all material times to this suit and particularly 1<sup>st</sup> August 2006 to 21<sup>st</sup> November 2011, he was employed by the Respondent as a security officer. The Claimant pleaded that he earned Kshs. 8,000/-per month and that the Claimant worked with due diligence and to the satisfaction of the Respondent. The Claimant averred that on 21<sup>st</sup> November 2011, he received a letter from the human resource manager stating that the Claimant's employment had been terminated. It was averred that the dismissal was unfair, unlawful and extremely inhumane as the Claimant had done nothing to warrant disciplinary action being taken against him, no hearing took place in relation to the decision to dismiss the Claimant and no due process was followed to arrive at the dismissal of the Claimant. It was averred that in light of the foregoing the Claimant was entitled to payment of terminal dues and damages being basic pay for the month of November Kshs. 8,000/-, house allowance Kshs. 2,475/-, one month salary in lieu of notice, payment of leave not taken for 5 years Kshs. 23,076/-, service pay at the rate of 15 days for each year worked Kshs. 32,307/-, damages for wrongful and unfair dismissal equivalent to 12 months Kshs. 96,000/-. The Claimant also sought a declaration that the Respondent's refusal and/or inordinate delay in recalling the Claimant back to work constitutes constructive dismissal and thus sought payment of the sums claimed as well as costs for the suit plus interest thereon.
2. The Respondent filed a memorandum of response on 4<sup>th</sup> September 2014 and confirmed that the Claimant was employed as a security officer and his salary was Kshs. 8,000/- per month subject to increase by the Respondent at its sole discretion. The Respondent denied that the Claimant had worked with due diligence and to the satisfaction of the Respondent. The Respondent averred that the Claimant was dismissed for lawful cause due to gross misconduct. It was stated that the Claimant had a poor disciplinary record with numerous warnings, deliberately refused to execute duties assigned to him and that the Claimant was duly notified of the reasons of termination before the final decision to terminate his services was made. The Respondent averred that the Claimant was not entitled to the sums claimed or any form of compensation since the termination of employment was lawful. The Respondent averred that the Claimant was paid the full November salary in spite of only having worked for 21 days plus one month salary in lieu of notice. The

Respondent averred that the Claimant is non-suited to receive any service pay as he was subscribed to the NSSF and had fully exhausted his leave days and hence no leave pay was due. The Respondent averred that the Claimant had fully discharged the Respondent per the discharge letter he signed in acknowledgement that he had no further claims against the Respondent. The Respondent denied the Claimant made any demand before the suit was instituted and prays that the suit be dismissed with costs.

3. The Claimant filed a reply to the memorandum of response on 25<sup>th</sup> September 2014 and joined issue with the Respondent in so far as the admissions. The Claimant denied all the averments of the Respondent's memorandum of response and put the Respondent to strict proof.
4. The Claimant testified on 10<sup>th</sup> December 2015 that he was underpaid by the Respondent, his former employer where he worked as a security guard. The Claimant stated that he was terminated on 21<sup>st</sup> November 2011 and at the time was told that he was not performing. He testified that it was summary dismissal and he was paid notice, and salary for the previous month but the payment was less the overtime he worked and for service for the years worked. He stated that he was not summoned or given notice before being called for the dismissal letter.
5. In cross examination, the witness testified that he had worked for 7 years with the Respondent and that his performance was good. He stated that there was only one warning letter and he could not recall the date of the warning letter. He testified that the letter said that he should be vigilant and he acknowledged the warning letter. On being referred to the exhibits filed by the Respondent, he admitted having received 5 warning letters exhibited by the Respondent. He testified that he did not complain and that the termination was based on previous conduct. He confirmed that he received the salary for November plus house allowance and had received payslips for all the months he had worked. He stated that he was not aware of the leave days and whether the calculation was not ok. He testified that the leave sought was for 2006, 2007 and 2011. He stated that he was entitled to overtime and the contract provided for overtime.
6. On re-examination, he testified that in regard to leave, the claim was for unpaid leave for 2006, 2007 and 2011. He stated that he had no complaint over his service. He was referred to his contract and confirmed that clause 9.0 made provision for overtime and shift allowance.
7. The Respondent called Joyce Kayumba who was the human resource manager of the Respondent. She testified that she was employed in 2002 and started working as a human resource manager in 2008. She knew the Claimant who was, in her words, a security officer from 2011. She stated that the Claimant started off well but during the years there were talks of discipline and negligence on his part. She gave him warning letters after discussions. She gave him warnings for failing to keep a record of visitors to the premises, he was warned for not wearing his gumboots as required and for the loss of crates due to negligence. The crates were stolen by a supplier of the company. She stated that the warnings were served and followed the company procedure which was that one would call the person, discuss the issue then they would sign the letter after understanding the content. She testified that the Claimant did not complain about the content and the last warning letter related to the loss of company crates worth about Kshs. 140,000/- and no complaint was received in respect of the letter. She stated that at the time of separation the Claimant earned a basic pay of Kshs. 9,900/- and was regularly issued with payslips. She testified that the last payslip shows that the Claimant received Kshs. 12,375/- as notice pay and that the NSSF and NHIF statutory deductions were paid. She stated that per year, the Claimant had 28 leave days and that he took leave and that he took leave in 2007, 28 days. She testified that in 2008, 2009 and 2010 he took leave and there was pending leave of 30 days and he was paid the 2011 leave dues. She stated that the Claimant signed a discharge voucher on 23<sup>rd</sup> December 2011 and accepted the payments made as full and final. She testified that within the December payslip the 30 days pro rata leave and service pay of 32,175/- were included even though the Claimant was a contributory to NSSF. She stated that the basis for termination was valid.
8. In cross-examination she testified that she would summon the Claimant and discuss the warnings.

She confirmed that she did not have any minutes and that it was a one-on-one discussion. She stated that it is within the code of conduct. She testified that within the contract the duties and responsibilities were not given.

9. The parties then filed written submissions. The Claimant filed his submissions on 17<sup>th</sup> December 2015 and the Respondent filed its submissions on 12<sup>th</sup> January 2016. In the submissions, the Claimant submitted that his claim revealed a substantial cause of action in law against the Respondent. He submitted that the basis for this surmise was the issues narrowed down for determination by Court. He framed the issues as follows:-

1. Whether the Claimant was a lawful employee of the Respondent at all material times
2. Whether the Claimant was wrongfully and unlawfully terminated by the Respondent
3. Whether the Claimant is entitled to the remedies prayed for
4. Who bears the costs of this suit

10. The Claimant submitted that it was not in dispute that he was a lawful employee of the Respondent and that the defence witness indeed had admitted knowing the Claimant having worked at the Respondent company as a security officer. On the second issue framed by the Claimant, it was submitted that the Claimant was terminated wrongfully and unlawfully vide a letter dated 21<sup>st</sup> November 2011 which detailed the reasons for the termination of the Claimant's services by the Respondent. The Claimant submitted that prior to the termination letter aforesaid, there had been other warning letters issued to him by the Respondent. He submitted that however, the Respondent did not put in place clear cut measures and open forums where the Claimant would have opportunity to defend his conduct as security officer. He submitted that it was the Respondent's witness testimony that the Claimant neglected his responsibilities. The Claimant submitted that there was no document exhibited that showed the Claimant's duties and responsibilities and that in the absence of failure to name the responsibilities of the Claimant left a loophole where the Claimant could be accused of anything as the actual scope of the Claimant's responsibility is not shown before the Court. The Claimant submitted that there was no proof of a discussion before the issue of the warning letters and that in the absence of such evidence the allegations that the issues were discussed prior to the Claimant being given warning letters remained just that, mere allegations. The Claimant submitted that in dismissing the Claimant from employment, the Respondent transgressed on the Claimant's rights in light of Section 41 of the Employment Act. The Claimant relied on the case of **Esther Wambui Karango v Palbina Tours & Travel Limited [2014] eKLR** where the Court held that the dismissal of the Claimant in that case was in violation of Section 45(1) as read with Section 45(2)(a) and (c) of the Employment Act. The Claimant submitted that he was entitled to the remedies sought being service pay and damages for unlawful dismissal. The Claimant submitted that he had discharged his onus under Section 47(5) of the Employment Act by showing that the dismissal was wrongful and unjustified while the Respondent had failed to discharge the evidential burden in rebuttal of the same. The Claimant sought costs and urged the Court to dismiss the Respondent's defence and enter judgment for the Claimant.

11. The Respondent submitted that there were valid reasons for termination of the Claimant. The Respondent submitted that the Claimant acknowledged receipt of the warning letters and did not dispute the contents of the letters. It was submitted that despite the warnings the Claimant's performance did not improve thus the decision to issue the termination. The Respondent submitted that the allegations of constructive dismissal did not hold water and that the Claimant did not lead any evidence in support of the allegations of constructive dismissal. The Respondent relied on the case of **Banking, Insurance and Finance Union (K) v Standard Chartered Bank of Kenya Ltd [2013] eKLR** where Ndolo J cited with approval the decision in **Catherine Kinyany v MCL Saatchi & Saatchi [2013] eKLR** where the Court held that in order for a claim of constructive dismissal to succeed, the Claimant must show that the Respondent acted in a way that made it

extremely hard for the Claimant to continue working. The Respondent submitted that the Claimant was not entitled to the reliefs sought and that in his pleadings and testimony before Court he admitted receiving the salary for the month of November as well as notice pay amounting to Kshs. 23,076/-. The Respondent submitted that the Claimant had exhausted his leave days and for the 2011 leave due, he received Kshs. 32,175/- as reflected in the December payslip. The Respondent submitted that the overtime claim must fail as it was not pleaded and no evidence was led to prove the same. Reliance was placed on the case of **Narcol Aluminium Rolling Mills v Stephen Apondi Ochieng [2009] eKLR** where the court held that for such damages as overtime, these must be specifically pleaded but must also be strictly proved. In regard to service pay, the Respondent submitted that the Claimant's claim for service pay could not succeed as the Claimant was enrolled under NSSF and the monthly contribution was paid by the Respondent as required by law. The Respondent asserted that in spite of this, it had given the Claimant, as a gesture of goodwill, service pay for 10 weeks. The Respondent relied on the case of **Evans Ocheing Nudih v Equity Bank Limited [2014] eKLR** where the Court declined to grant service pay. The Respondent submitted that the Claimant is not entitled to damages for wrongful dismissal for reasons stated above. The Respondent submitted that if however the Court is inclined to grant relief under this head of damages, the sum should be capped at three months and relied on the case of **Bernard Dojo Mbaja v Air Traffic Limited [2014] eKLR**.

12. All the submissions and authorities cited have been considered by the Court in coming to this decision. The Claimant's case was that he was dismissed from employment wrongfully. The Respondent's defence was that the Claimant was dismissed for good cause. In the dismissal letter issued to the Claimant dated 21<sup>st</sup> November 2011, the Respondent stated thus:-

*Dear Cosmas,*

*TERMINATION OF SERVICE AS A RESULT OF POOR PERFORMANCE*

*We regret to note that your performance has been deteriorating even after being warned in writing and several verbal cautions. Over the years the company has lost its property worth thousands of shillings under your security watch, case in example the company crates.*

*Even after this incidence you still do not dispense your duties effectively and most of the time you are always sleeping on your job.*

*The company is left with no other choice but to terminate your services with immediate effect.*

*As a gesture of good will the company will pay you all your dues which will include:*

- November 2011 salary*
- One months salary in lieu of notice*
- 30 days prorata leave days*
- 10 weeks service pay (in lieu of 5 years service)*

*Please handover company property to your HOD and collect your dues from the Finance Department.*

13. The Claimant received Kshs. 12,375/- and Kshs. 32,175/- under a heading Miscellaneous on the November and December payslips. The narration on the payslips does not show how the sum of Kshs. 32,175/- was computed. It is hard to discern whether there was payment of the 10 weeks service pay and what period of leave dues was covered. The Claimant from all accounts was not an exemplary employee who worked with diligence. His service to the company was peppered by constant complaints about his performance and diligence. He was given warnings evidenced by the letters issued and confirmed by the person who gave the warnings, the defence witness. The Claimant therefore was dismissed for good cause and the Respondent has discharged its burden under Section 43(1) of the Employment Act.

14. Unfortunately for the Claimant, he signed a discharge on 23<sup>rd</sup> December 2011. In the discharge, he stated that he had received all his dues in full and final settlement from the Respondent. He confirmed that he had no further claims towards the company and that he understood that the company had no claims against him.
15. The Claimant therefore had no business filing the suit before the Court and from the foregoing, the claim would therefore accordingly fail. I have agonised over the issue of costs and given that the Respondent did not provide a breakdown, the Claimant was unable to discern what was due to him and thus filed the suit. The Court will let the losses lie where they are. The Claimant and the Respondent will each bear their own costs. Instead of moving the Court the Claimant ought to have sought an explanation or breakdown.
16. The Court regrets the delay in concluding the matter. The Claimant filed submissions on 17<sup>th</sup> December 2015 and the Respondent on 12<sup>th</sup> January 2016 but the file was not available for me to write the judgment having been misdirected to the Principal Judge of the Labour and Employment Court. The file was finally placed before me in February and I proceeded to pen a judgment which was not delivered as result of the loss of my laptop *inter alia* in early March 2016. I apologise to the parties for the delay in delivery of judgment occasioned by factors beyond my control.
17. The finding of the Court is that the suit has no merit and it is thus stands dismissed with no order as to costs.

Orders accordingly.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of May 2016**

**Nzioki wa Makau**

**JUDGE**