



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.258 OF 2015

(Before D. K. N. Marete)

GEORGE MORARA NYAKIIBA.....CLAIMANT

VERSUS

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

JUDGMENT

This matter was originated by way of a Memorandum of Claim dated 27th October, 2015. The issues in dispute are therein cited as;

- a. *Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent.*
- b. *Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim.*
- c. *Whether the claimant is entitled to an award of certificate of service and*
- d. *Who should pay costs of the suit.*

The respondent in a Respondent's Reply/Defence to the claimant's Memorandum of Claim dated 5th February, 2016 denies the claim and prays that it be dismissed with costs.

The claimant's case is that at all material times to this case, he was orally employed by the respondent as an oven man with effect from 1st August, 2000. The claimant also served in other capacities including action as a foreman in his section from July, 2010

up to August 2015. The claimant was officially issued with a letter of appointment dated 2nd June, 2011 on the 16th June, 2011 after 10 years of full time honest dedicated service to the respondent.

It is the claimant's further case that he served the respondent with loyalty, diligence and competence until 30th August, 2015 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 on allegations of stealing 1.5 litres of *utto* oil belonging to the respondent. He was not afforded an opportunity to dispute these allegations.

The claimant further avers that during his stint of service cumulating to fifteen (15) years, the respondent entrusted him with his valuables in various capacities and at no time was a complaint of this nature or any at all raised over his character. That the allegations of theft against the claimant was malicious and well calculated to form a basis to unlawfully terminate him from employment on the following grounds;

- i. *No evidence of the alleged theft of utto oil was availed to the claimant;*
- ii. *No evidence of investigation was availed to the claimant of the alleged theft.*
- iii. *The claimant did not admit theft of utto oil or any at all as alleged in the letter of termination.*
- iv. *To date no report has been made to the police by the respondent regarding the alleged theft of utto oil or any at all by the claimant as is the due process of law;*
- v. *to date no criminal charged have been pressed against the claimant by the respondent regarding the alleged theft of the respondent's utto oil;*
- vi. *Particular of the alleged theft of utto oil or any at all as alleged in the termination letter were never availed to the Claimant;*
- vii. *The Claimant was never accorded a hearing nor an opportunity to call his witness in his defence;*
- viii. *The respondent had in the past and while in duty entrusted the claimant with the respondent's valuables and no allegations of theft had ever arisen for a period of over 15 years.*
- ix. *The respondent failed to act in accordance to justice and equity before terminating his services.*

The claimant further avers that the termination of his employment was contrary to Sections 41,43 and 44 of the Employment Act, 2007 as follows;

Section 41 (1) of the Employment Act 2007 verbatimly set out that;

“ when an employer intends to dismiss or terminate the employment of an employee from among other reasons misconduct, it must explain to the employee in a language he/she understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The respondent never explained to the claimant the reason for the said termination from employment.”

Section 44 (4) of the Employment Act entitles the employer to summarily dismiss an employee on the grounds among others misconduct. However the same provides that an employee *should be given an opportunity to dispute the truthfulness or accusation leveled against him.* The claimant submits that he was not accorded hearing before his termination this violates the provision of the Employment Act.

Section 43 (1) of the Employment Act obligates the employer to proof reason or reasons for termination failure to which the termination of employment is unfair within the meaning of Section 45 of the Employment Act. Section 45 (2) reads;

- a. *That the reason for termination is valid.*
- b. *That the reason for the termination is a fair reason (s)*
- c. *That the employment was terminated in accordance with fair procedure.*

He claims;

- i. *3 months pay in lieu of notice less one month given*

Basic salary + house allowance x 2 months

(16767 + 4836 = 21603) x 2Kshs. 43206/-

ii. *Unpaid wages for July & August, 2015*

21,603 x 2.....Kshs. 43,206/-

iii. *Leave dues for 2015 (probate – one month basic salary)*

.....Kshs.16,767/-

iv. *Severance pay*

17 days of wages of one completed year x years worked

14,125 x 15 yrs worked.....Kshs. 211,875/-

v. *Compensation for unfair termination*

Gross pay (Basic + house allowance) x 12 months..Kshs.259,236/-

vi. *Leave dues from August, 2000 up to July, 2010 26 days x (basic + house allowance) x years worked/26*

(26 x 21,603 x10)/26.....Kshs. 216,030/-

vii. *Unfair deductions for alleged losses incurred.....Kshs. 220,000/-*

viii. *Leave travel allowance from August 2000 up to July, 2010..Kshs.27,000/-*

ix. *Acting allowance (acted as a foreman) Salary of a foreman Kshs. 40,000/- (Difference is Kshs. 40,000 -21,603= 18,397) x months worked 18,397 x 60 months (July, 2010 up to date of termination....Kshs. 1,103,820/-*

TOTAL KSHS.2,141,140/-

In the penultimate, he prays for;

- a. *A declaration that the claimant's termination from employment was unlawful, unprocedural and unfair.*
- b. *The sum of Kshs. 2,141,140/- as set out at paragraph 11 above.*
- c. *An order directing the respondent to issue discharge to the claimant for purposes of collection of his savings of Kshs. 72,901/- from Jubilee Insurance.*
- d. *Certificate of service*
- e. *Cost of this suit and interests on (b) and (c) above at court rates from time of filing this cause until payment in full and*
- f. *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent generally denies the claim and particularly denies that the claimant was in her employ.

3. In answer to paragraphs (3), (4), (5), (6), (11) & (12) of the claim, the respondent states that the claimant has never been in its employment. The claimant shall at the hearing of this claim be put to strict proof of his allegations thereof.

5. In the alternative and without prejudice to the foregoing it is the Respondent's averment that if the claimant was in its employment which is denied, his contract of employment was lawfully terminated. That the contractual terms of engagement with the respondent, all the relevant provision of the Collective Bargaining Agreement and the law governing employment were fully complied with by the respondent thus leading to the severance of contractual ties of employment between the claimant and the respondent. The claimant is estopped from pleading to the contrary having been terminated validly after undergoing fair procedural requirements.

6. Further to the respondent's averment in paragraph (5) above, it is the respondent's statement that the claimant was served with a notice of termination of employment. That notwithstanding the claimant's conduct, the claimant received all his final dues and therefore executed a final clearance form required of the claimant.

The matter came to court variously until the 16th March, 2016 when the parties agreed on a determination by way of written submissions.

The issues for de

1. Whether the claimant was an employee of the respondent?

termination therefore are;

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 claimant's supplementary list of documents dated 7th October, 2015 and filed on 29th instant. These are;

1. *The claimant's National Identity Card.*

2. *A letter of appointment dated 2nd June, 2011.*

3. *Collective agreement between the respondent and Bakery, Confectionary, Food Manufacturing and Allied Workers Union signed and dated 11th September, 2014.*

The claimant in his written submissions seeks to rely on Section 9 (2) 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)" and also 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."

This is 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. This is as follows;

“An employer should keep written records of all employees and in line with section 10 of the Act, the employer should in the circumstance produce all the records envisaged under section 74 in any proceedings before this Honourable Court.”

The respondent in her written submissions does not pursue this limb of defence or at all. The issue of absence of employment having been abandoned and this having been ably submitted on by the claimant leaves this court with no option but a finding of employment by the respondent. I therefore find a case of employment of the claimant by the respondent and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. It is the claimant's case and submission that his employment was terminated on an excuse of wrongly packing bread in crates. The respondent denies this and particularly denies that the claimant was in her employee.

He also seeks to rely on the authority of **Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR** which emphasizes the requirements of substantive and procedural fairness in cases of termination and employment.

Section 45 (4) (b) of the Employment Act, 2007 provides as follows:-

....that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.”

He further sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

(a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.

(b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

(c) That the employer has heard and considered any explanations by the employee or their representative.

(d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

The claimant further 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 respondent in defence enlist the following documents;

1. *Final dues clearance dated 8.09.2015.*
2. *Clearance note dated 01.09.2015.*
3. *Termination Memo dated 12.08.2015.*
4. *Notice to Show Cause dated 20.07.2015.*
5. *Claimant's own letter of apology dated 19.06.2015.*

She further produces the following documents in support of her defence;

1. *Minutes of disciplinary committee held on 24.06.2015 that was attended by the claimant.*
2. *Evidence of Waweru Mbogo contained in his report dated 3/07/2015.*
3. *Internal Memo addressed to George Morara Nyakiora (Claimant) dated 13.01.2015 warning him of improper conduct in discharging his duties.*
4. *Internal Memo addressed to George Morara Nyakiora (Claimant) warning him of absenteeism dated 22.10.2014.*
5. *Internal Memo addressed to George Morara Nyakora (Claimant) warning him of absenteeism dated 12.01.2014.*
6. *Minutes of disciplinary committee held on 30.12.2014 that was attended by the claimant.*
7. *Internal Memo addressed to George Morara Nyakiora (Claimant) warning him of absenteeism dated 14/03/2012.*

The respondent in answer to the claimant's case brings out a case of misconduct and gross misconduct on the part of the claimant. These she submits culminated in the termination of the employment of the claimant after due disciplinary processes in which

the claimant accepted default on his part as follows;

"5. Arguments

(a) Evidence of misconduct

(I) Absenteeism

... there are records that shows that the claimant was negligently towards his work by being absent severally without a reasonable ground. There are a number of letters from the claimant to the administrator of the respondent apologizing for being absent without a good reason. There are warning letter from the Respondents Finance and Administration Department warning the claimant about his absenteeism. They include:-

- a. *Letter dated 14/03/2014*
- b. *Letter dated 24/02/2014*
- c. *Letter dated 22/10/2015*

... all these records show that the claimant was not dutifully undertaking his responsibility as agreed in the contract.

(ii) Gross misconduct- carelessness

... the claimant was reported to have improperly discharged his duties while paying wages to casual employees. Kenya shilling seven hundred and fifty eight could not be accounted for, a duty the claimant was responsible for.

When complains were raised against the claimant a disciplinary proceedings was undertaken by the disciplinary committee (See complaint report dated 3.01.2013 and minutes of disciplinary committee held at Eldoret branch on 30/12/2014). The claimant was present before the disciplinary committee. He was found to have been careless in discharging his duties and the committee agreed upon an advice memo for improvement of job competency.

(iii) Gross-misconduct- stealing

... on 19.06.15, the Claimant was caught red handed leaving the respondent's premises after completing his duties at 10.00pm with one and a half litres utto oil in his bag with intention of stealing/sneaking it out without the knowledge or the authorization of the administrator. In support Your Lordship are:-

- a. A statement by Waweru Mbogo, a security officer who caught him dated 3/07/2015.*
- b. a complaint report dated 8/07/2015.*
- c. Minutes of disciplinary committee held at Eldoret Branch dated 24/06/2015.*

... the claimant accepted that he was caught by the security with the utto oil.

The disciplinary committee resolved to suspend him for two weeks pending termination of his employment. After suspension he was issued with a notice to show cause why termination could not be issued against him dated 20/07/2015. on 30/07/2015 the claimant was issued with a notice of termination of employment.

This is a demonstration that the respondent partook all substantive and procedural aspects of termination of employment. It is clear that the claimant accepted and acknowledged responsibilities for his conduct and theft of *utto* oil.

The respondent further sought to rely on the following authorities in support of his defence;

(i) Civil suit 146 of 2008 at the High Court of Mombasa Fulgence Sunza Masai versus Kenya Revenue Authority (2014) eKLR. Here the fact that the Claimant was accorded audience before a disciplinary committee was evidence enough that he was allowed to defend his rights.

(ii) Cause No. 837 of 2011, Miriam Siwa Versus Post Bank Limited (2014) eKLR. The Court held that the claimant's contract of Employment was terminated for a fair and valid reason which is gross-misconduct, stealing by servant contrary to section 281 of the Penal Code.

(iii) National Union of Mine Workers and Another and the Commission for Conciliation, Mediation and Arbitration case no. JR 2512 of 2007. The court observed that it was proper for the employer to take disciplinary action and summarily dismiss her because she had broken the trust and the good faith that should exist in an employer/employee relationship. In this case therefore, the claimant had broken the trust and the good faith that existed between him and the respondent.

(iv) Raphael Juma Juma Versus Armed Forces Canteen Organization (AFCO). Nairobi Industrial Cause No. 1070 of 2012. Here, as stated in the Halsbury's Laws of England

(4th Edition, Volume 16) at page 482, the duty of the court is to check whether in particular circumstances of the case, the employer acted in a reasonably fair manner. In the case above it is very clear that the respondent has a valid reason to terminate the employment of the claimant, a process that was carried out fairly.”

These also superbly carry her case.

There is however a very notable aspect of the defence which perturbs all aspects of legal practice. The defence as set out in the Respondent Reply/Defence to the defendants Memorandum of Claim aforesaid brings out a case of absence of employment of the claimant by the respondent and/or misconduct by the claimant in the course of employment. The respondent thereon goes on to demonstrate a case of misconduct by

the claimant. The case of absence of employment is not pursued any further, or at all. Is this nature of defence permissible? Why would one wish to offer a defence that the abandoned from the word go? I would answer that this is improper and untenable under all circumstances. Parties are called upon to sequentially and logically pursue their pleadings in support of the respective cases.

This matter must now be determined from the standpoint of the conduct of the claimant during his course of employment and the reaction of the respondent's to the same. It is apparent that the claimant fell short of appropriate performance of his employment contract through his misconduct. The respondent as submitted was left with no choice but to terminate his employment. From the long analysis of the parties respective cases it is obvious that the respondent's case overwhelms that of the claimant. The claimant has miserably failed to demonstrate a case of wrongful, unfair and unlawful termination of his employment. I therefore find the termination lawful and hold as such.

On a finding of a lawful termination of the employment of the claimant, he becomes dis-entitled to the relief sought. This answers the 2nd issue for determination.

I am therefore inclined to dismiss the claim with an order that each party bears its own costs of the claim. And this clears all the issues for determination.

Delivered, dated and signed this **3rd day of June 2016.**

D.K.Njagi Marete

JUDGE

Appearances

Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant. Mr. Siele Sigira instructed by Mr. Siele Sigira & Company Advocates for the respondent.