



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 532 OF 2014

PETER GITAHI

CLAIMANT

v

KENYA NUT COMPANY LTD

RESPONDENT

JUDGMENT

1. Peter Gitahi (Claimant) had his employment terminated by Kenya Nut Company Ltd (Respondent) on 10 September 2014.
2. On 23 October 2014, he moved to Court alleging that the termination of employment was *unfair, wrongful and unlawful*. He sought several heads of relief.
3. In a Response filed on 9 December 2014, the Respondent asserted that the termination of employment was fair, both procedurally and in substance.
4. The Claimant filed a Rejoinder and the Cause was heard on 7 March 2016 after which the parties filed written submissions.
5. The Court has considered the pleadings, evidence and submissions and adopts the issues for determination as posed by the parties, to wit, *whether the dismissal was unfair and appropriate remedies* (although the Claimant identified 4 issues, the same boil down to 2 issues).

Whether dismissal was unfair

Procedural fairness

6. Section 41 of the Employment Act, 2007 has outlined the essential requirements of procedural fairness where an employer intends to terminate the services of an employee on the grounds of *misconduct, poor performance or physical incapacity*.
7. The reason given for the dismissal of the Claimant was *taking company properties without lawful permission*. The evidence identified the said property as meat. The allegation therefore falls under the rubric of *misconduct*.
8. Although the Claimant testified that he was not issued with a show cause notice, he admitted that he was invited to appear before a Disciplinary Committee where he was afforded an opportunity to make representations.

9. The Respondent produced minutes of a Disciplinary hearing held on 9 September 2014, and the minutes indicate that the allegations against the Claimant were read to him and that questions were posed to which he responded, and that he asked for forgiveness at the end of the proceedings.

10. The minutes also show that 2 named union representatives (shop steward and union representative) were present during the hearing and they all signed the minutes.

11. From the material placed before Court and the testimony, the Court is satisfied that the Claimant was aware of the allegations to confront, that he was afforded an opportunity to make representations and that representatives of a union with whom the Respondent had a recognition agreement were present.

12. The Court therefore finds that the dismissal was procedurally fair.

Substantive fairness

13. In terms of sections 43 and 45 of the Employment Act, 2007, an employer is under an obligation to prove the reasons for dismissing an employee, and that the reasons are valid and fair.

14. In an endeavour to discharge the burden, the Respondent cross examined the Claimant and also called its Security Officer to testify.

15. The witness testified that he had received information about losses of meat from the Farm Accountant and he decided to investigate.

16. As part of the investigations, a search was conducted among employees in the slaughterhouse (Claimant was one) and he was found with one and a half kilos of meat in his pocket instead of the one kilo he had bought.

17. Although the witness stated that the Claimant also admitted to the theft while recording an investigatory statement, the said statement was not produced in Court.

18. However, all in all, the Court is satisfied that the Respondent has proved that the Claimant had an extra half of a kilo of meat which he could not account for and for which he sought forgiveness, and that in all likelihood, the meat was from the slaughterhouse where the Claimant was working.

19. In the view of the Court, the Respondent had and has proved as valid and fair, the reason for the dismissal of the Claimant.

Appropriate remedies

Pay in lieu of notice

20. According to the Respondent's exhibit 5, the Claimant was paid 30 days' pay in lieu of notice and therefore nothing turns on this head of claim.

Pending/accrued leave

21. No evidential foundation for this relief was provided and it is therefore unsustainable.

Overtime

22. Again, no evidential basis for this head of claim was led and it is rejected.

Gratuity/Severance pay

23. No statutory or contractual basis for gratuity was proved and it is rejected.

24. Severance pay, on the other hand becomes implicated when an employee has been declared redundant.

25. Equally, no contractual basis for severance pay was laid before Court and it is rejected.

Compensation

26. With the conclusion that the dismissal was fair, compensation in terms of section 49 of the Employment Act, 2007 does not arise.

Conclusion and Orders

27. The upshot of the foregoing is that the Memorandum of Claim herein is dismissed with costs to the Respondent.

Delivered, dated and signed in Nakuru on this 29th day of July 2016.

Radido Stephen

Judge

Appearances

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

For Respondent Mr. Ngeno instructed by Kaplan & Stratton Advocates

Court Assistant Nixon