



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 112 OF 2016

SUSAN ACHIENG OHAGA.....CLAIMANT

VERSUS

KIGANJO BAKERY LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 28th October, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 25.05.2016 through Gori, Ombongi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Compensation for wrongful dismissal to a maximum of 12 months' wages and general damages emoluments or contingencies at 15% of the total amount to Kshs.152, 412.00.
- b) Damages for lost earning from 27.06.2013 up to today being monthly earnings at the rate of 12, 701.00 and annual increment of 5% of the salary p.a.
- c) Three months' pay in lieu of notice Kshs. 38, 103.00.
- d) Unpaid leave for 2013 Kshs.12, 701.00.
- e) Costs of the suit.
- f) Interest on a, b, and d above till payment in full.

The response to the memorandum of claim was filed on 20.06.2016 through Kinyua Kiama & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

The claimant was employed by the respondent in 2002 on probation and thereafter confirmed as a permanent employee. The claimant's duties entailed the assignment of baking bread at the respondent's establishment.

The claimant was on duty on the night of 26.06.2013. It was her case that on that night she had brought along her Mandazi with a view to eating the same at the time tea was to be served during the working hours. It was the claimant's case that on that night she failed to eat the Mandazi and upon being searched on her exit on the morning of 27.06.2013, she was found in possession of the Mandazi. She was summoned at the office and given a termination letter dated 27.06.2013. The letter stated that the claimant had baked the Mandazi using the respondent's property and had done so despite previous several verbal

warnings. The claimant was therefore summarily dismissed with immediate effect. The claimant testified that she was not paid terminal dues and claimed terminal dues per her statement of claim. The claimant testified that the respondent's enterprise did not include baking of Mandazi but was involved in baking bread and nothing else. The claimant's further case was that the employees were allowed to carry their own food to eat the same while on duty and on that material occasion she had carried only 2 pieces of Mandazi. The claimant's testimony was that the 2 pieces of Mandazi was her private food and she had not used the respondent's property to bake the Mandazi.

The respondent's witness (RW) was the respondent's director one Patel. RW testified that it was the respondent's policy that employees are served tea and bread while on duty and employees were not allowed to bring their own food to eat while on duty. RW testified that the claimant was paid Kshs. 7, 473.00 as terminal dues and she signed the certificate of termination - but the claimant had denied receiving such pay or signing the certificate. The court gave leave for the respondent to file a bank statement to show that the alleged cheque of Kshs. 7, 473.00 had been paid and such evidence was not made available. RW confirmed that the claimant had not been found baking the Mandazi but on exit she had been checked and found in possession of the Mandazi.

The **1st issue** for determination is whether the termination was unfair. It is clear that the claimant was not given a notice and a hearing as envisaged in section 41 of the Employment Act, 2004. As was held in **Shankar Saklani –Versus- DHL Global Forwarding (K) Limited [2012]eKLR** a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract. Thus, in absence of a notice and a hearing, the termination was procedurally unfair. Further, there is no evidence that the claimant used the respondent's property to bake the Mandazi. Accordingly, the court returns that the termination was unfair for want of a valid reason as envisaged in section 43 of the Act.

The **2nd issue** is whether the claimant is entitled to 12 months' pay for compensation. It is not in dispute that the respondent provided tea and bread for its employees while on duty. The court considers that the claimant contributed to her termination by bringing her Mandazi at the workplace and by failing to declare the same during check in. While considering that the claimant had served with dedication for around 11 years, the claimant's contribution is placed at 50 % and she is awarded 6 months' salaries for unfair termination at Kshs.12, 701.00 making **Kshs.76, 206.00**. She is also entitled to one month pay in lieu of termination notice under section 35 (1) (c) of the Employment Act, 2007 being **Kshs. 12, 701.00**.

The **3rd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a) The claimant is awarded **Kshs.7, 473.00** being pay in lieu of leave for 2013 and as computed by the respondent.
- b) The claimant is awarded **Kshs. 12, 701.00** being pay for June 2013.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The respondent to pay the claimant **Kshs. 109, 081.00** by 01.12.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
2. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 28th October, 2016**.

BYRAM ONGAYA

JUDGE