



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 725 OF 2013

PETER MUTUA MWANZIA.....CLAIMANT

VERSUS

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

JUDGMENT

1. The Claimant filed his claim through the firm of Nyabena Nyakundi & Company Advocates claiming damages for wrongful and unfair termination of Claimant's services and failure by the Respondent to pay him his terminal benefits.

2. The Claimant states that he was employed by the Respondent on 7.10.1999 as a turn boy at a daily wage of Kshs. 218 which amount was increased and at the time of termination of his services he was earning a daily wage of Shs. 909/= making the monthly wage Shs. 27,270. He avers that he was not given any appointment letter but had copies of documents proving existence of a relationship attached to his claim as Appendix 1.

3. He states that he served the Respondent with loyalty and diligence until 3.11.2012 when he was wrongfully and unfairly terminated without being paid his terminal benefits. He prays for:

i. The sum of Kshs 1,110,800.00 being notice pay, service pay for 13 years, leave days earned but not taken, security deposit, House allowance.

ii. Compensation for wrongful dismissal to a maximum of 12 months' wages amounting to Shs. 327,240/=.

iii. Costs.

iv. Interest.

v. Any other relief as the Court may deem just.

4. The Respondent filed a Memorandum of Reply on 18.6.2013 wherein they deny the averments in the Memorandum of Claim and put the Claimant to strict proof. They also aver that if at all the Claimant was engaged by the Respondent it was on temporary basis at a daily wage rate depending on the availability and nature of work.

5. They further aver that the Claimant is not entitled to any of the prayers for damages sought. They pray

for the Claim to be dismissed with costs.

6. In evidence the Claimant reiterated the contents of his Memorandum of Claim and stated that on 3.11.2012 he reported to work as usual but the Operations Supervisor told him to go away because he had been dismissed. He states that he asked for the letter of termination and also to be furnished with reasons for dismissal but none was given.

7. The Claimant states that he worked for the Respondent for 13 years and that he never went on leave for the entire period. He also seeks for reimbursement of security deposit of Shs. 20,000/=.

8. The Respondent put up one witness one Ephraim Wangare who stated that he knew the Claimant because he worked under him distributing bread. He stated that the Claimant was employed on a casual basis and only reported to work when there was need. That he used to work for 8 hours, 2 to 3 days in a week for two weeks in a month. That he was paid on a daily rate on completion of his assignment.

9. RW1 stated that the Claimant was not terminated from his services. That the Claimant unpacked 7 empty crates of bread and was given time to recover them and he failed to do so. He was told to sign a recovery form to enable Respondent recover from his wages but the Claimant declined to sign and never reported to work thereafter.

10. The Respondent's witness admitted that the Claimant is entitled to the security deposit claimed but denied that he is entitled to the other prayers sought for the reason that he absconded from work. He admitted that they never issued a show cause letter for the reason that the Claimant could not be found. He also admitted that they were not deducting NHIF and NSSF dues from the Claimant's wages.

11. The Claimant in submissions states that he was an employee regardless of the fact that his contract had not been reduced into writing. He submits that he worked for six days a week for 13 years. It is also submitted that the muster roll of 2012 sought to be relied on is not dated and one cannot discern which year that particular page was plucked from.

12. The Claimant also submits that there was no valid reason for his termination as he testified stating that in the normal course of ferrying bread he left some crates with some customers which he was to collect the following day, the Respondent would hear none of it. In lieu of this he states that due procedure was not followed in terminating his services as provided in Sections 41 and 42 of the Employment Act, 2002

13. He submits that he was not paid his terminal dues and he prays for the Court to allow the Claim as prayed.

14. The Respondent submits that the Claimant's engagement cannot be construed as a contract of service as he was not engaged for more than three months at a time and as such the claim must fail.

15. The Respondent further submits that the Claimant was not terminated as claimed but absconded from duty. They state that the Claimant never led evidence to support the allegation that he was terminated. That the requirements of Section 43 and 45 are not applicable as the Claimant was not terminated.

16. They conclude their submissions stating that the Claimant is not entitled to the prayers sought. Notice pay, leave days, and service pay, they state is not applicable since the Claimant was paid a daily rate on completion of an assignment and was never at any time engaged as an employee. Further, that he absconded from duty, did not give notice and was not unfairly or unlawfully terminated.

17. The Respondent admits that the security deposit is refundable subject to recovery of the amount of the lost crates of bread. They pray for the rest of the Claim to be dismissed with costs.

18. Having considered evidence of the parties herein, issues for determination are as follows:

1. Whether the Claimant absconded duty or was dismissed.

2. ***What was the nature of employment relationship between Claimant and Respondent?***
3. ***If he was dismissed, whether there were valid reasons to warrant the dismissal.***
4. ***Whether due process was followed before dismissal of Claimant.***
5. ***What remedies if any to grant in the circumstances.***

19. On the 1st issue, the Claimant avers that the Respondent dismissed him on 3.11.2012. The Respondent avers that he absconded duty. The Respondents however have not denied receiving a letter Appendix 2 from the Claimant's Advocate claiming unfair dismissal.

20. Respondents were also served with another demand notice Appendix 3 from Kituo Cha Sheria dated 28.1.2013. There is no indication that the Respondent responded to this letter even to indicate that the Claimant absconded duty. The assertion that he absconded duty is an afterthought.

21. I therefore find that the Claimant was dismissed as per his testimony.

22. On the 2nd issue, the Claimant has also averred that he worked as a permanent employee and worked for Respondent since 1999 – working 6 days a week. The Respondent on their part avers that the Claimant was a casual engaged on need basis and would work 2 to 3 days weekly to transport bread.

23. The only way the truth of this relationship would have been explained is to have the muster role produced in Court as exhibit. The documents of employment are in the custody of the Respondent and they are obliged to keep records of employment as provided under Section 74(1) of Employment Act which states as follows:

(1) "An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars:

- a. of a policy statement under section 6(2) where applicable;***
- b. specified in section 10(3);***
- c. specified in section 13;***
- d. specified in sections 21 and 22;***
- e. of an employee's weekly rest days specified in section 27;***
- f. of an employee's annual leave entitlement, days taken and days due specified in section 28;***
- g. of maternity leave specified in section 29;***
- h. of sick leave specified in section 30;***
- i. where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;***
- j. of food rations where applicable;***
- k specified in section 61;***
- l. of a record of warning letters or other evidence of misconduct of an employee; and***

m. any other particulars required to be kept under any written law or as may be prescribed by the Minister.

24. The Respondent on their part chose to produce records for November 2012 only which shows that Claimant only worked for 3 days in November 2012. The other parts of the documents expected were not produced in Court even for earlier or later periods.

25. The Claimant's employment card Appendix 1 shows that he was a casual staff of the Respondents and on 19/09/2010, he paid a security deposit of 20,000/= to the Respondents. Assuming he was a casual employee as per the employment card, then he could not remain a casual from 2010 to 2012.

26. Section 9(1 & (2) of employment Act 2007 states as follows:

1. ***"A contract of service:***

a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

b. which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

2. 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 subsection (3).

27. The Claimant therefore having worked as a casual employee and work being done going on even from 2010 to 2012 converted to permanent and pensionable terms and so the assertion that he worked piecemeal is not tenable and is not supported by any documents.

28. On the 3rd issue, the Respondents are obliged to give reasons for dismissing the Claimant. However, no reasons were given as the Claimant was dismissed orally. If any reasons were advanced, the Court is not aware of the said reasons. It is therefore my finding that there were no valid reasons to warrant dismissal of the Claimant.

29. On due process, the procedure envisaged is as provided under Section 41 of Employment Act which provides for a formal disciplinary hearing. It is my finding that the Claimant never went through any disciplinary hearing process.

30. I therefore find that the dismissal of the Claimant was unfair and unjustified as provided under Section 45 (2) of Employment Act which states as follows:

2. ***"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 employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure.

31. What remedies is the Claimant entitled to?. Claimant indicated he worked for Respondent from October 1999 though there is no evidence of the period from when he was employed as he has no

appointment letter.

32. The Respondent on their part didn't produce the muster roll to either agree or disapprove this fact but RW1 stated that when he joined Respondent's employment in 2009 he found Claimant working there. Without any evidence to the contrary I will take 1999 October as the Claimant's start date and find that he worked for Respondent for a total of 13 years upto November 2012 earning 909/= daily which is upto $909 \times 26 \text{ days} = 23,634/=$. So based on this figure I award him as follows:

1. **1 months salary in lieu of notice = 23,634/=.**

2. **Service pay for 13 years = 15 days x 13 x 23,634 = $\frac{1}{2} \times 23,634 \times 13 = 153,621/=$**

3. **Security deposit admitted by Respondent = 20,000/=**

4. **Leave days for 2012 = 23,634/=**

5. **House allowance at 15% of basic pay = $0.15 \times 23,634 \times 13 \times 12 = 553,035.6$**

TOTAL = 773,924.6/=

6. **Plus costs.**

Read in open Court this 24th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyabena for Claimant – Present

No appearance for Respondent