



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 795 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 29<sup>th</sup> April, 2015)**

GEORGE KIIO MUTUNGA .....CLAIMANT

VERSUS

PEMBE FLOUR MILLS COMPANY LIMITED .....RESPONDENT

**JUDGMENT**

1. The Claimant herein George Kiio filed his Memorandum of Claim on 24/1/2012 in person. His claim is that he was employed by the Respondent in April 1993 as an operator at a salary of 19,480/=. He then served the Respondent with dedication until he was terminated without notice and without payment of his terminal dues. His prayer is for payment of severance pay, leave and house allowance for 7 years all totaling 147,074.
2. The Claimant contends that the contract was verbal and he was never issued with any letter of appointment.
3. The Respondents file their defence on 5/11/2013 through the Federation of Kenya Employers. They admit that they employed the Claimant with effect from 1<sup>st</sup> December 2000 as a turn boy through a letter of appointment dated 25/11/2000 which letter was annexed as Appendix 1 on Respondents documents.

The Claimant worked until 8/12/2013 when he was terminated from employment for illegally and irregularly appropriating to himself the Respondents goods. At time of termination the Claimant's salary was 19,480/= per month inclusive of house allowance as evidenced from his pay slip Appendix 2 and 3 on Respondents list of documents.

4. The Respondents also aver that the Claimant vide his letter dated 6/2/2013 admitted having received the Respondents goods but failed to explain their whereabouts and could not produce any weighbridge receipts or records to confirm receipt of the goods from motor vehicle registration No. KAC 584 S as per his purported delivery note.
5. They also aver that the Claimant was paid gratuity of Kshs.175,474/= before terminal benefits as per Appendix 6. It is also Respondents position that the Claimant went for his leave from the time he was employed as per Appendix 10(a) to 21(b) attached. The Respondent therefore submitted that the Claimant's case should be dismissed with costs.

## **Issues for determination**

6. Upon considering the evidence of both parties, the issues for determination are as follows:

1. **Whether there were valid reasons to dismiss the Claimant.**
2. **Whether due process was followed before his dismissal.**
3. **If the Claimant is entitled to prayers sought.**

7. On 1<sup>st</sup> issue, the Respondents have submitted that there were valid reasons to warrant Claimant being dismissed being appropriation of Respondents goods. Evidence of the appropriation is not however adduced. The Respondents seems to rely on a reply to show cause letter issued to Respondent to show he admitted he took the goods in question. However, a careful perusal of this letter does not reveal any point where he admitted the allegations.

In the letter he stated in part -----

***“I know they know about it but since they want to pin me and since they are not happy about the way returns are dealt with. They were receiving it before the same was handed over to me and my friend Jackson for the office committed which I am not aware of. That is all I wish to state.***

***Signed”***

This is definitely not an admission.

8. Section 43 of Employment Act states as follows:

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 4***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

Since there were no valid reasons existing at time of termination which Respondent has not proved, I find the termination unfair and justified.

9. The Respondent have also submitted that Claimant was accorded a fair hearing. The hearing anticipated here is one provided under Section 41 of Employment Act which states as follows:

***(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.***

10. The Claimant was not accorded any such hearing and this definitely makes the termination unfair and unjustified. The assertion that the dismissal was summarily done is also not true as despite

finding Claimant culpable as alleged, the Respondent allege they paid him his full benefits a benefit not available in instances of summary dismissal.

11.As to the prayers sought, the Claimant sought payment of severance pay which is not payable unless it is in instances of redundancy as provided under Section 40(g) of Employment Act.

On leave, the Respondents have proved that Claimant proceeded for leave and have attached all the leave application forms for the period. On house allowance, the Claimant's pay slip shows he was paid house allowance and so the prayers he has sought are not tenable.

I will only award Claimant 12 months salary for unfair termination being:-

**12 x 19480 = 233,760/= plus costs and interest.**

The Respondent will also issue him with a Certificate of Service.

It is so ordered.

**Dated and delivered in open court this 29<sup>th</sup> day of April, 2015**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Claimant present in person

No appearance for Respondent