



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 17 OF 2014**

**PETER OMIRO MAKOYO..... CLAIMANT**

**VERSUS**

**MINI BAKERIES (MSA) LTD ..... RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for compensation for unfair and unlawful termination of the claimant's employment by the respondent on 24.10.2012 by which the claimant seeks to recover kshs.265,544. The gist of the claimant's case is that he was employed by the respondent in her bakery from September 2006 as a casual and later as permanent employee October 2011. His salary was kshs.13,976 per month. He worked without any problems with the employer until 23.10.2012 when he was found carrying home 5 damaged loaves of bread by the Operations Supervisor and invited to disciplinary hearing.
2. He appeared before a Disciplinary Panel of 3 on 24.10.2012 and explained that he was authorized to carry away the damaged bread and the panel hearing him asked him to write an apology letter which he did on 24.10.2012. He was however dismissed for the alleged misconduct by letter dated 24.10.2012. The claimant has therefore denied the alleged misconduct and brought this suit to recover damages for unfair and unlawful termination of his employment.
3. The respondent admits that she employed the claimant from 2006 as a casual and on permanent basis from October 2011. It is the respondent's case that she terminated his employment summarily on 24.10.2012 for gross misconduct namely, stealing 5 loaves of bread from the her bakery. It is further respondent's case that she accorded the claimant a hearing after which he wrote an apology letter. That he was never the less dismissed and paid all his terminal dues.
4. The case was heard on 10.6.2015 when the claimant testified as CW1 while the respondent called Muhsin Muhammed, Mwarua Syria and Consolata Kabau as RW1, RW2 and RW3 respectively. Thereafter both parties filed written submissions.

**Analysis and Determination**

5. After carefully considering the pleadings, evidence and the submissions, it is clear that the claimant was employed by the Respondent as a Mixer in her Bakery at Mtwapa until 24.10.2012 when he was dismissed summarily for gross misconduct. The issues for determination are:
  - a. Whether the termination of the employment was unfair and unlawful.
  - b. Whether the reliefs sought should be granted.

## **Unfair and unlawful termination**

6. Cw1 told the court that on 23.10.2012, he was authorized by the manager of the respondent's bakery to take 5 loaves of damaged bread from the bakery dustbin to take to his chicken at home. That while on the way Cw1 met the Rw1 who enquired why Cw1 was carrying away bread. That Cw1 explained that he had authority from the Bakery manager to do so but Rw1 escorted him back to the bakery where the Bakery manager confirmed that he had permitted Cw1 to take away the stale bread.
7. Rw1 was however not convinced and directed Cw1 to go for disciplinary hearing before Rw3 at the head office at Mombasa where he explained that he had permission from the bakery manager to take home the damaged bread. Cw1 maintained his innocence in respect of the alleged theft.
8. The Rw1 has however contended that Cw1 stole the bread from the bakery and denied that the Bakery manager gave it to him. He maintained that the bread was certified fit for sale and not damaged by the respondent's Quality Assurance manager. Rw1 however never called the Bakery manager and the Quality Assurance Manager to testify in this case. That piece of evidence is therefore hearsay and it is dismissed. In any event, even if the court was to believe that a Quality Assurance manager certified the bread as fit for sale, there is no proof that Rw1 never tampered with the exhibits by exchanging the damaged bread with good bread in order to frame the claimant.
9. After evaluating the evidence adduced by both parties, the court has on a balance of probability found that the claimant has proved that he was unfairly and unlawfully dismissed from employment by the respondent. Under section 45 of the Employment Act (EA), dismissal of employment is unfair unless the employer proves that there was a valid and fair reason to justify the dismissal and that a fair procedure was followed.
10. As observed above the respondent did not prove that the bread allegedly stolen was not damaged and that the claimant took away the bread without the permission from the bakery manager. Consequently no valid reason was proved by the respondent to justify the dismissal of the claimant. Even if the taking away the damaged bread by the claimant was to be treated as a valid reason for dismissing him, the same could have been a fair reason for dismissal within the meaning of section 45 (2)(b)(i) of the EA because the claimant had been permitted to take the bread away by the bakery manager who was not subjected to any disciplinary action.
11. Likewise the respondent did not prove that she followed a fair procedure before dismissing the claimant. Section 45 (5) (c) describes fair procedure as according an oral hearing to employee, under section 41 of the Act, before dismissing him and also granting him a certificate of Service under section 51 of the Act. The said section 41 requires that before an employer dismisses an employee for misconduct, he must explain the reason for the dismissal to the employee and afford him a chance to defend himself in an oral hearing. Such a hearing must be done in the presence of a shop floor union representative or another employee of the accused employee's choice and must be conducted in a language they understand.
12. In this case, the foregoing elaborate procedure was never followed before dismissing the claimant because Rw1 & Rw3 never told the court that they explained to the claimant about his right to be accompanied by shop floor union representative or another fellow employee of his choice to the disciplinary hearing as provided for under section 41 supra. The termination of the Claimant's services was therefore unfair and unjustified within the meaning of Section 45 of the Employment Act for the reasons stated above.

## **Reliefs**

11. In view of the finding above, the court makes declaration that the termination of the claimant's employment by the respondent on 24.10.2015 was unfair and unlawful. Under section 49 (4) of EA the court is required to take into account several matters, including the wishes of the employee, in deciding which relief to award. After considering the reliefs sought in this case, it is clear the claimant wishes to be awarded damages and not to be reinstated.
12. Consequently he is awarded damages under section 49 (1) of EA being 6 months' gross salary compensation for unfair and unlawful termination totaling to KShs.83, 856 as prayed. In the court's view the claimant could, with due diligence, secure alternative job of equal pay within 6 months

after termination. The court has also considered the fact that the claimant had served the respondent for 7 years from 2006.

13. He also gets kshs.27,952 being 2 months' salary in lieu of notice because he had served for over 5 year as provided for in the Collective Bargaining Agreement (CBA) and that letter of appointment. He is also awarded kshs 12,112.55 pay in lieu of 26 days leave but only for 2011/2012 due to time bar of 3 years. The respondent never opposed the order for Certificate of Service and it is
14. granted as prayed.

### **Disposition**

15. For the reasons stated above, judgment is entered for the Claimant against Respondent declaring the termination of the Claimant's employment unfair and unlawful, and awarding him Kshs.123,920.55 plus costs and interest. The claimant will get a Certificate of Service.

It is so ordered.

**Signed, dated and delivered at Mombasa this 25<sup>th</sup> day of September 2015**

**O.N. MAKAU**

**JUDGE**