



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 135 OF 2014

STEVE ONYARI NYAMBEGERA.....CLAIMANT

v

BAKE 'N' BITE MOMBASA LTD.....RESPONDENT

JUDGMENT

1. Steve Onyari Nyambegera (Claimant) sued Bake 'N' Bite Mombasa Ltd (Respondent) on 6 May 2014, and he stated the issues in dispute as
 1. Unfair termination and or wrongful dismissal
 2. Notice
 3. Leave
 4. Damages: Loss of prospective future earnings.
2. The Respondent filed a Response on 19 June 2014 and the Cause was heard on 19 February 2015 and 21 May 2015.
3. The Claimant was directed to file and serve submissions before 4 June 2015 but only filed his submissions on 17 June 2015. The Respondent was directed to file submissions before 18 June 2015 but it only filed the same on 16 July 2015.
4. The Court has considered the pleadings, evidence and submissions and identified the issues arising for determination as, *when did the employment relationship commence, whether the Cause was settled on payment of dues to the Claimant, whether the dismissal of the Claimant was unfair and appropriate remedies/claimant's contractual and or statutory entitlements.*

Commencement of employment relationship

5. The Claimant's case was that the Respondent employed him in March 2010 and thus he served for 3 years and 8 months until dismissal in October 2013.
6. According to the Respondent, the correct period of service for the Claimant was one and a half years. However, the Respondent did not set out exactly when the relationship commenced in its pleadings nor did its witnesses disclose when the relationship started.
7. By virtue of section 9(2) of the Employment Act, 2007, the Respondent was under an obligation to draw up a written contract of service with the particulars demanded by section 10 of the Act which include the commencement date of the employment.

8. The Respondent failed to carry out this obligation and pursuant to section 10(7) of the Act, it was incumbent upon it to disprove the Claimant's assertions that he was employed in 2010. This duty was not discharged.
9. The Court therefore finds that the employment relationship started in March 2010 and ended on 29 October 2013.

Whether claim was settled on payment of dues

10. The Respondent pleaded in paragraph 39 of the Response that the Claimant's case was without substance or bona fides because his dues had been paid to him.
11. The Claimant admitted that he was paid some final dues but he contended that the same was insufficient/inaccurate.
12. The Respondent did not pursue/make this question as one needing determination during testimony and the Court says nothing further.

Whether dismissal was unfair

Burden placed upon employees

13. In complaints of unfair termination of employment, an employee bears the initial burden to prove that an unfair termination of employment occurred. That is a burden imposed by section 47(5) of the Employment Act, 2007. It is a very low threshold burden.
14. According to the pleadings, the Claimant was on suspension and when he reported back on 28 October 2013, the Respondent's Human Resources Manager told him his services had been terminated and he should leave.
15. In testimony, the Claimant stated that he was suspended on 14 October 2013 and was instructed to return on 28 October 2013 on which date he was referred to the Respondent's Nairobi office where a meeting was held.
16. At the meeting, it was agreed that the Claimant's services be terminated.
17. The Claimant was being paid by the month. Section 35(1)(c) of the Employment Act, 2007 requires the giving of at least 28 days written notice of termination of employment in such circumstances.
18. In so far as written notice was not given, the Court is satisfied that the Claimant has satisfied the very low threshold standard of demonstrating that an unfair termination of employment occurred.

Procedural fairness

19. The Respondent issued the Claimant with a suspension letter dated 26 September 2013. The allegations laid against the Claimant were outlined in the suspension letter.
20. The letter informed the Claimant that the suspension was to allow for investigations and determination of the allegations.
21. However, the suspension letter did not request the Claimant to tender any explanations or make representations. Instead, the Claimant and his Union were invited to a meeting in Nairobi through a letter dated 28 October 2013. The Union confirmed its availability for a meeting on 29 October 2013.
22. Minutes of the meeting held on 29 October 2013 were produced. A member of the Union and a Works Committee official were present. The Claimant was present.
23. According to the minutes, the Claimant was allowed to make representations on the allegations.
24. The Respondent's third witness stated that he was the Chief Shop Steward and that he was present during the hearing on 29 October 2013 where the Claimant was given an opportunity to make representations. His testimony was not controverted or challenged.
25. The Court must determine whether the process was in tandem with the statutory requirements of procedural fairness as envisaged by section 41 of the Employment Act, 2007.
26. In *Antony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* (2013) eKLR, I had this to say about the essentials of procedural fairness

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

27. In my view, and in consideration of the correspondence produced and the testimony tendered in Court, the Claimant was notified of the allegations to confront and he was afforded an opportunity to make representations on 29 October 2013 at a face to face hearing. Officials of the Union he was a member of were present and I am therefore satisfied that the Respondent complied with the peremptory requirements as to a hearing.
28. The tide would have been different had this case been presented as one of summary dismissal which must have as a basis a fundamental breach of the contract or breach of a fundamental term of the contract to justify not giving written notice.

Substantive fairness

29. The reasons outlined in the suspension letter and also referred to during the hearing on 29 October 2013 were broadly related to integrity and adherence to procedures. There were allegations also of inciting other employees to sabotage the Respondent's operations.
30. These were the reasons the Respondent was required to prove (section 43 of the Employment Act, 2007) and prove as valid and fair reasons (section 45 of the Act).
31. The Respondent's first witness stated in his testimony that he was a shop steward and that the Claimant and some 2 other employees had used excess yeast in mixing the flour for baking.
32. He also stated that the Claimant had incited other employees to use excess yeast.
33. The Respondent's second witness was its Human Resources Manager. She stated that while doing her rounds she came across the incident where excess yeast had been used but when she asked the Claimant, he responded that he had been instructed by a supervisor to use high yeast but the supervisor denied giving such instructions.
34. She further stated that although the Claimant had been employed as a packer he had been promoted to a mixer and he knew the instructions for preparing the dough for baking.
35. The Court will examine whether these reasons have been proved.
36. The Respondent did not clarify the integrity issues the Claimant had. It appears it was the incitement of other employees. The employees allegedly incited were not disclosed or mentioned. The Court was not informed when the incitement happened.
37. The Court finds this reason not proved.
38. But another reason was that the Claimant had not adhered to procedures. It is not disputed that excess yeast had been used to prepare the dough by the Claimant. There was non-compliance with the procedures.
39. The Claimant was not an initiate in his work. It was work he had been doing for some time. He knew or ought to have known the procedures. He did not attempt at all to explain in his testimony what and how the use of excess yeast occurred.
40. The Court finds that he disregarded those procedures and some damage was occasioned.
41. The question therefore turns as to whether the penalty imposed was an overreaction. Did it fit in with the transgression?
42. The undisputed evidence before Court was that the Respondent would recover the cost of any losses from the employees. The Claimant stated and was not challenged that he was deducted Kshs 13,000/- on account of the damage.
43. The Respondent witness also stated that the Claimant had no previous disciplinary cases/warnings.

44. The penalty agreed with the Claimant's union was normal termination. The Respondent however also deducted from the Claimant's dues an amount in respect of the damage.
45. This was double punishment in my view, and therefore the termination was not in accord with justice and equity.

Appropriate remedies

1 month pay in lieu of notice

46. Because the penalty was normal termination, the Claimant was entitled to payment of 1 month salary in lieu of notice. The dues as computed by the Respondent did not include pay in lieu of notice.
47. The Claimant's unchallenged testimony was that he was on a daily wage of Kshs 697/- at time of separation. But no evidence was led on number of working days in a month.
48. The Court would therefore revert to the monthly pay of Kshs 13,206/- for Dough Maker agreed with the Union as an appropriate measure to compute the monthly basic pay.
49. The Court finds for the Claimant in the sum of Kshs 13,206/- under this head of claim.

Leave for 3 years and 8 months

50. The Claimant tabulated his leave entitlement as Kshs 37,024/40. His testimony that he had not gone on leave during the tenure of employment was not controverted by production of leave records which the employer should keep.
51. The Respondent produced a terminal benefits schedule showing that the Claimant was paid Kshs 21,459/- on account of 30 days leave. The exact period was not stated.
52. The Court would therefore find for the Claimant in the sum of Kshs 15,565/40 being the difference.

Compensation

53. The Claimant sought the maximum compensation which he quantified as Kshs 200,736/-.
54. Compensation is discretionary and considering that the Claimant served for about 4 years, the Court would award him the equivalent of 3 months gross wages assessed as Kshs 51,504/- (based on basic monthly wage and house allowance).

Damages

55. The Claimant sought a whopping Kshs 6,624,288/- as damages in respect of lost prospective earnings.
56. However he did not lay any evidential, contractual or other legal basis for the same, and it is declined.

Conclusion and Orders

57. The Court finds and holds

- i. the Respondent complied with the requirements of procedural fairness
- ii. in deducting the cost of the loss and terminating the employment of the Claimant, the Respondent penalised the Claimant twice
- iii. the penalisation was not in accord with justice and equity hence substantively unfair.

58. The Court therefore awards and orders the Respondent to pay the Claimant

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|-----------------------------------|---------------|
| (a) 1 month pay in lieu of notice | Kshs 13,206/- |
| (b) Leave balance | Kshs 15,565/- |

(c) Compensation

Kshs 51,504/-

TOTAL

Kshs 80,275/-

59.Claim for damages for lost earnings is dismissed.

60.Each party to bear own costs, Claimant having to failed to file submissions within agreed timelines without explanation.

Delivered, dated and signed in Nakuru on this 23rd day of October 2015.

Radido Stephen

Judge

Appearances

For Claimant Ms. Wachira instructed by Korongo & Co. Advocates

For Respondent Mr. Onyony instructed by Onyony & Co. Advocates

Court Assistant Nixon