



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 599 OF 2010**

**(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 8<sup>TH</sup> OCTOBER, 2015)**

**MUSYOKI MWELELI ..... CLAIMANT**

**VERSUS**

**MASAKU LUCKY WHOLESALERS.....RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant herein filed his Claim on 28/5/2011 in person claiming unfair termination of employment and failure by the Respondent to pay him his terminal benefits.
2. The Claimant avers that he was employed by the Respondent in March 1996 as a general labourer earning a salary of 2,750/= without house allowance. In 2007, the salary was increased to 6,000/= per month.
3. He avers that on 13/4/2010 he was working with a colleague as usual until the end of the day at 7 pm. They came back and handed over their sales and were given permission by one Kenzi to leave. The following morning when he came to work, he was sent away by the boss who asked them why they abandoned work the previous evening. They were then terminated and he came to Court seeking redress as enumerated in his Memorandum of Claim.
4. He avers that he was not given any appointment letter but their names were just entered in the muster roll. He also stated that he was not given any dismissal letter but was verbally dismissed. He denied that he caused any loss to moneys for goods given to him to deliver to customers.
5. The Respondents opposed this claim. They filed their Amended Statement of Defence and Counter Claim on 27/1/2011 through the firm of B. M. Mung'ata & Company Advocates. They agreed that he worked for them but was dismissed for failing to account for goods supplied to him to take to customers for sale. RW1 stated that she did the accounts and noted the shortfalls but never informed the Claimant.
6. The Respondents in their response have further stated that the claimant absconded duty after making the losses. They counter claimed for 31,280/= the loss apparently made by the Claimant.
7. Having considered evidence of both parties, the issues for consideration by this court are as follows:
  1. ***Whether there were valid reasons to warrant dismissal of Claimant.***
  2. ***Whether due process was followed before Claimant was dismissed.***
  3. ***Whether the Claimant is entitled to remedies sought.***

8. On 1<sup>st</sup> issue, the reason advanced by Respondents for dismissing the Claimant is that he failed to account for money he was supposed to for goods given to him to supply to customers. The Respondents aver that the loss was 31,280/=. No evidence has however been made by the Respondents to show itemized list of goods and prices given to the Claimant *vis a vis* the money he returned showing the shortfall. This reason contradicts the response which states that the Claimant absconded duty.
9. It is therefore the finding of this court that there were no valid reasons warranting dismissal of the Claimant.
10. On the 2<sup>nd</sup> issue, it is clear that no due process was followed before the dismissal of the Claimant. Section 41 of Employment Act states:

**“(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.”**

11. This process was not followed but the Claimant was dismissed verbally.
12. Having found that there were no valid reasons to terminate the Claimant and that no due process was followed it is this court’s finding that the termination of Claimant was unfair and unjustified in terms of Section 45 of Employment Act which states as follows:

1. *No employer shall terminate the employment of an employee unfairly.*
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.*

13. I therefore find for Claimant and award him as follows:
  1. *1 month salary in lieu of notice = 6,000/=*
  2. *Service pay of 15 days salary for each year worked being 3,000 x 14 years = 42,000/=*
  3. *12 months salary compensation for unlawful and unfair termination = 6,000/= x 12 = 72,000/=*

**TOTAL = 120,000/=** plus cost of interest.

Read in open Court this 8<sup>th</sup> day of October, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Claimant

No appearance for Respondent