



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1646 OF 2011

BETWEEN

JASPER BASWETI MAIRONGI
CLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED
RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Amutala instructed by Moerwa Omwoyo & Company Advocates for the Claimant

Ms. Njoki Gachigi instructed by Chiuri Kirui & Rugo Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 26th September 2011 and a Reply to the Statement of Response and Counterclaim on 4th October 2012. The Respondent filed its Statement of Response and Counterclaim on 27th April 2012. The Claimant relied on his pleadings and written submissions, whose contents, were highlighted by Mr. Amutala, in a brief address to the Court on 12th June 2013. The Respondent called one of its Staff Supervisors James Mwaura and its Accountant Kora Karanja, who both testified on 12th June 2013 when hearing closed. The dispute was last mentioned on 1st July 2013 when the Parties confirmed the filing of their Final Arguments and were advised by the Court Award would be delivered on notice.

2. The Claimant's position is that he was employed by the Respondent Supermarket as a Shop Assistant, on the 12th January 1999. He earned a monthly salary of Kshs. 41,197. He was charged in the Chief Magistrate's Court at Kibera in Nairobi, with the offence of stealing by servant, in Criminal Case Number 352 of 2009. The Respondent was the Complainant in the criminal proceedings where it was alleged the Claimant and Co-Accused Peter Juma Njuguna, had stolen Kshs. 287,085 from the Respondent. The Respondent terminated the Claimant's contract of employment on 28th September 2008. He never received the letter terminating his employment. He states that the Respondent based its decision on the

tramped-up charges. The Criminal Court found him not guilty, in a Judgment rendered on the 24th January 2011.

3. The Claimant submits that the Respondent ignored the Judgment of the Criminal Court. He made a demand to the Respondent to reinstate him on acquittal, or he is paid his full terminal dues, a letter which the Respondent ignored. He was not accorded fair hearing, and held an impeccable employment record. In view of the Judgment in the Criminal Court, the decision of the Respondent terminating the Claimant's contract was null and void. The Claimant seeks-

- a. Unpaid salary and allowances up to the date of termination at Kshs. 57,675;
- b. Outstanding 60 days of annual leave at Kshs. 118,174.66;
- c. 3 months' salary in lieu of notice at Kshs. 123,591;
- d. 12 months' gross salary in compensation at Kshs. 494,364;
- e. Compensation for performance of other duties other than those of a Shop Assistant, at Kshs. 98,872; and
- f. Employer's contribution to be forwarded to N.S.S.F at Kshs. 7,200

Total..... Kshs. 899,878 .26

The Claimant prays for costs, interest and any other relief the Court may deem appropriate to grant.

4. Responding to the Counterclaim, the Claimant states he was acquitted of stealing the sum of Kshs. 287,085 from the Respondent in the criminal trial. He recanted the admission that he owed the Respondent money. The admission itself was extracted from the Claimant when he was held in police custody at the instigation of the Respondent. The document on the admission was never produced in the criminal proceedings and would be inadmissible in the present proceedings. It was not true that the Claimant disappeared after the alleged stealing. The Respondent knew where the Claimant lived with his wife. The Claimant urges the Court to allow his Claim and reject the Counterclaim.

5. The Respondent's position is that the Claimant was fairly summarily dismissed on 20th September 2008. He absented himself from the place of work; neglected to perform his work; was on reasonable and sufficient grounds suspected of stealing the sum of Kshs. 298,000 from the Respondent; and failed to return to work or communicate with the Respondent until he was arrested by the police 4 months after absconding. After he absconded, Internal Auditors discovered a shortfall or loss of Kshs. 298,000 from the Till manned by the Claimant. The Claimant made a written admission of theft to the Security Officer on arrest. His terminal dues were computed by the Respondent, amounting to Kshs. 55,140, which was set off against the loss of Kshs. 298,000- leaving the Claimant with a debt of Kshs. 241,860, which the Respondent counterclaims.

6. James Mwaura testified he worked as a Supervisor at Ongata Rongai Tusker Mattresses Branch between 2007 and 2009. The Claimant was a Cashier under the supervision of the Witness. There was information obtained by the Respondent that Cashiers were stealing from the Tills. The Respondent laid a trap, by monitoring every transaction at the different Tills. It was realized the Cashier at Till Number 1 Jasper Mairongi left his Till unattended and left work early on 20th September 2008. The Respondent closed the Till and waited for the Claimant. He did not return. After one month on 28th October 2008, the Respondent issued the letter of termination. There was no chance for the Respondent to initiate a formal disciplinary hearing, as the Claimant absconded. Internal Audit confirmed cash was missing from Till Number 1. Cross-examined, the Witness maintained he was a Supervisor with the Respondent. The Claimant absconded and never returned to work. There were newspaper notices of his disappearance. The Witness had the duty to allocate Tills.

7. Kora Karanja testified there was insider fraud at the Respondent Branches, starting at the Town of Eldoret. Karanja served as the Receivables Accountant based at the Head Office. The Head Office was informed a Cashier had disappeared at the Ongata Branch. Karanja proceeded to Ongata, and conducted investigations. He concluded the Claimant had colluded with a Computer Clerk to fleece the Respondent. The two suspects would return dummy set of items, and take the cash equivalent of those 'returned'

items. Credit Notes would come from the Customer Care. They had discovered a weakness in the system, where negative transactions would take place at the Till. The Respondent's inventory was intact. Furniture was for instance not sold, but the accounts would indicate furniture was returned. A shortfall of Kshs. 298,000 was traced to the Claimant. He deserted when he heard the Respondent was investigating. On cross-examination, the Witness stated he never met Mairongi as he deserted on learning about the investigations. The two employees hacked into the password of James Mwaura to show him as the guilty Cashier. The Respondent urges the Court to reject the Claim and allow the Counterclaim.

The Court Finds and Awards:-

8. The Claimant was employed by the Respondent as a Shop Assistant with effect from 1st May 2001 as per his letter of appointment attached to the Statement of Claim marked JBM1. His contract was terminated by the Respondent on 20th September 2008, after he was alleged to have embezzled Kshs. 298,000 from the Respondent. He alleges his contract was unfairly terminated; he was not given the opportunity to defend himself; and was absolved of any wrongdoing by the Criminal Court in C.M. Criminal Case Number 352 of 2009. He alleges that the Respondent could not second guess the Court on the criminal culpability, and was bound to reinstate him or pay him the full terminal benefits after the acquittal.

9. The Court is satisfied that the Claimant deserted work upon learning of pending investigations into allegations of theft of his employer's money, which centred on his Till Number 1. He vanished on the date Internal Auditors were called in, the 20th September 2008. He remained underground and by 28th October 2008 when the Respondent wrote the letter of summary dismissal, had not gone back to work. The matter was reported to Ongata Rongai Police Station. The Claimant was only arrested 4 months after his desertion and arraigned in Court. He wrote a statement on arrest, conceding he was involved in the fraud.

10. The Respondent was not bound by the decision of the Criminal Court which came after the Respondent had made its own internal investigations, and taken its own disciplinary decision. The disciplinary process is different from the criminal process. The first is an internal private mechanism between an employer and an employee, while the second is a public process where the state through the police seeks to protect the society against criminal behaviour, ensuring the safety of the general population and sustenance of social order. The nature of the two processes and the standards of proof, are different. The objectives are different. Unless the employer had informed the employee that its decision on the dispute at the workplace depended on the outcome of the police and judicial work in the public domain, the employee had no reason to see any linkage between the processes. The work of the police is not to investigate employment offences, but criminal offences, just as the work of the Criminal Court is not to try employment offences, but to try criminal offences. The Criminal Court concluded that the prosecution had not established the Claimant's guilt beyond reasonable doubt. There was no obligation on the part of the Respondent to establish guilt of the Claimant beyond reasonable doubt, and even if there was, how would the Respondent have done so while the Claimant remained underground? The Claimant deserted, making it impossible for the Respondent to undertake a formal disciplinary process as contemplated under Section 41 and 45 of the Employment Act 2007. The decision by the Respondent to terminate the Claimant's contract one month after he absented himself, and to even offer him terminal benefits was a reasonable and fair employment decision. The Claim has no merit whatsoever and is rejected in its totality.

11. The Respondent has put in a Counterclaim of Kshs. 242,860. This is worked from a total of Kshs 298,000 which the Claimant is said to have stolen. His terminal benefits were calculated at Kshs. 55,140. The Respondent did not give adequate evidence to support its Counterclaim. There were two persons charged in the Criminal Court. They were charged jointly with the stealing of Kshs. 287,085. The figure is different from the amount of Kshs. 298,000 given in the Counterclaim. There was no material to show the exact amount stolen by the two employees. The two conflicting figures are drawn from the same Internal Audit. The Respondent ought to have been consistent to merit the grant of the Counterclaim. In establishing that the Claimant had committed an employment offence, the Respondent was supposed to have reasonable and sufficient ground to suspect that the Claimant had stolen from the Till. Such

reasonable and sufficient grounds were availed to the Court. In establishing the Counterclaim, the Court thinks the Respondent ought to have gone beyond merely suspecting that the Claimant had stolen, and give adequate and consistent material to the Court demonstrating the amount stolen and therefore awardable to the Respondent in the Counterclaim. This was not done. ***In the end, the Court is satisfied that both the Claim and the Counterclaim must fail. The Claimant however, given the history of the matter, had no good ground in bringing the Claim to Court, and shall pay the Respondent the costs of the Claim and Counterclaim, to be assessed by the Deputy Registrar.***

Dated and delivered at Nairobi this 24th day of January 2014

James Rika

Judge