



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NYERI**

**CAUSE NO. 19 OF 2013**

**KENYA UNION OF COMMERCIAL FOOD**

**AND ALLIED WORKERS.....CLAIMANT**

***VERSUS***

**KAMAHUHA FARMERS**

**CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant in this suit was employed by the respondent as a night guard at a salary of Kshs.3000 per month with effect from 1st August, 2005. His services were terminated as a result of a burglary that took place on the night of 15th July, 2011 while he was on duty.
2. The claimant claimant was arraigned in court on a charge of failing to prevent a felony but the same were withdrawn at the instance of the respondent pursuant to what the respondent claimed was a trade off for the claimant forfeiting his terminal dues.
3. When the matter came up for hearing, the court gave directions that since the issue in dispute appeared to be whether as a result of the theft incident in respect of which criminal charges were preferred against the claimant but later withdrawn, he can sustain a claim for wrongful termination of employment and be awarded compensation by the court, the parties proceed and prepare written admissions in that regard. Whereas, the respondent filed submissions as directed the claimant did not.
4. It is not in dispute that the claimant was an employee of the respondent serving as a night guard. It is further not in dispute that on 15th July, 2011 while the claimant was on duty, theft occurred at the respondent's premises as a result of which assorted items went missing.
5. By a letter dated 27th October, 2011, marked as annexure 6 in the claimant's memorandum of claim, the claimant is indicated as having accepted that he left his place of work without permission as a result of which the theft occurred. He is indicated therein as having agreed to forfeit his overdue salary and be freed from the criminal charges he was facing before the Magistrate's court at Thika. The letter is purportedly thumb printed by the claimant, implying it was not drafted by him. Further his alleged thumb print is not witnessed as is the practice. The matter of withdrawal or discontinuance of the criminal case against the claimant was however recorded by that court on 10th November, 2011 and the claimant noted as acquitted under section 204 of the CPC.
6. By a letter dated 29th November, 2011 the claimant's Union complained on his behalf that he was terminated without payment of his terminal dues. The Union therefore proceeded to demand on his behalf the payment of Kshs.341,140 whose details were set out in the said letter.
7. The respondent replied to the said letter on 5th December, 2011 expressing its surprise concerning the demands by the Union on behalf of the claimant. According to the respondent, the claimant

- was given an option to either forfeit his over due salary and be cleared of the criminal charges or to sustain the claim and continue with the criminal prosecution. Having elected to forfeit the overdue salary his claim was therefore surprising to the respondent.
8. The matter was consequently escalated to the Ministry of Labour who appointed Mr. Chigiti as a conciliator.
  9. By a letter dated 2nd March, 2012, allegedly signed by a Mr. Simon Mburu for the respondent, Hellen Njeri for the Union and Mr. Chigiti, the Union is purported to have agreed to pay the claimant Kshs.229,280. This letter appears to form the basis of the claimant's claim as per his memorandum of claim.
  10. In his statement filed in court on 11th April, Mr. Bernard Ndungu Kogi stated that when they were called by the Labour Officer, they told him that they could not sign or deliberate without authority of the members. They were three at the meeting with the labour officer namely Mr. Mburu Macharia, Mr. Evanson Waweru and himself. According to him he refused to sign the letter dated 2nd March, 2012 in which the respondent is purported to have agreed to pay the claimant Kshs.229,280 but Mr. Mburu went ahead and signed without authority.
  11. To this point, the court appears to apprehend the controversy to be that there was lack of clarity or agreement between the claimant and the respondent over the circumstances and the consequence of withdrawal of the criminal charge the claimant was facing.
  12. The claimant, is purported to have thumb-printed the letter dated 27th October, 2011 which appeared to be the basis and condition for the withdrawal of the charges he was facing. His thumb-print as the court observed is not witnessed as is the practice in such cases.
  13. The claimant was a member of a Union (KUCFAW) hence the Union ought to have been involved in the proceedings of 27th October, 2011 at which a decision was made to discontinue the criminal charges against the claimant on condition that he forfeits his overdue salary.
  14. Further, the respondents does not deny that they participated in the meeting with conciliator Mr. Chigiti at which a decision was arrived at to pay the claimant some Kshs.299,280. Their only quarrel was that one of them signed the letter without the authority of the members.
  15. From the foregoing, it is therefore more probable that the claimant may not have fully understood the proceedings of 27th October, 2011 and its consequences as regards the fate of his terminal dues.
  16. Further, the fact that Mr. Mburu may have signed the letter of 2nd March, 2012 without authority does not necessarily negate the validity of the said letter. Lack of authority to sign the letter, if at all is the case, can be a basis of an independent claim against Mr. Mburu. The court therefore regards the letter dated 2nd March, 2012 as evidence of the agreement reached between the parties with the assistance of the conciliator and hereby enters judgment for Kshs.299,280.
  17. Concerning claim for 12 months wages being compensation for renegeing on the agreement reached between the parties, this claim fails for two reasons. First, it has no foundation in Employment Law and second, the circumstances under which the claimant's contract of employment was terminated renders the making of such an award unjust.
  18. In conclusion the claimant shall have judgment in the sum of Kshs.229,280.
  19. It is so ordered.
  20. ***Dated at Nyeri this 4th day of March, 2014.***

**ABUODHA N. J**

**JUDGE**

***Delivered in open Court in the presence of Ms. Macharia for the Claimant and in absence of Mr. Kimwere for the Respondent.***