



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI
INDUSTRIAL CAUSE NO. 101 OF 2013

ANASTASIA W. KITHINJI.....CLAIMANT

VERSUS

MT KENYA NUTS & AGRICULTURAL COMMODITIES LTD.....1ST RESPONDENT

NAWIRI CO-OPERATIVE SOCIETY.....2ND RESPONDENT

JUDGMENT

1. The claimant via his memorandum of claim dated 26th November, 2012 avers that he was employed by the respondent from 1st November, 2005 to 6th April, 2006 as General Manager.
2. By a resolution of the Board allegedly passed on 6th April, 2006, the claimant was summarily dismissed for causing the respondent a loss of approximately Kshs.6,930,000 which arose as a result of sale of macadamia nuts on credit without following proper procedure.
3. The claimant denied these accusations claiming she never gave any authorizations for the alleged credit transactions. She further avers that she was never subjected to any disciplinary process nor placed under any investigation over the loss.
4. The respondent in its memorandum of response justified the dismissal averring that as the General Manager the claimant was the overall supervisor and controller of the respondents' operations. According to the respondent, the claimant in her position was accountable officer and could not pass the blame to other employees who were her juniors. The respondent therefore averred that the claimant's rights as an employee were never violated and that summary dismissal was justifiable under the circumstances.
5. At the trial, the claimant testified that she was not present at the meeting where the Board decided that he be dismissed though usually she attended Board Meetings. She further testified that she was never issued with any letter to show cause and that she was never presented with any allegations against her prior to dismissal. It was her further evidence that she was never paid her terminal dues.
6. In cross-examination she stated that the nuts were sold but not by her. She was at the material time away for a meeting.
7. The respondent through Mr. Joseph Njeru Mugo testified that the claimant sold macadamia nuts

- unprocedurally. No supporting documents accompanied the sale. He stated further that the company tried to follow the sale but was not paid. The Board therefore took a decision to summarily dismiss the claimant based on the irregular sale. He stated that he became CEO of the respondent after the event and was relying on records in the file. He conceded on cross-examination that the respondent had no letter raising the allegations prior to the dismissal.
8. Counsel for the claimant in his closing submissions reiterated that the dismissal was wrongful and unfair since the claimant was not issued with allegations she was facing and afforded a chance to defend herself prior to the dismissal. Counsel therefore proceeded to compute what he thought was the measure of compensation due to the claimant. The figures were however neither pleaded nor led in evidence during the trial.
 9. Counsel for the respondent for its part has however submitted that the dismissal was justified and fair. According to counsel, the claimant was the responsible accounting officer. He further submitted that the claimant was afforded an opportunity to be heard but declined to present herself before the Board.
 10. One issue which is critical to the determination of the dispute and which neither side referred to, is the relationship between this claim and the Employment Act, 2007.
 11. The claimant was terminated on 6th April, 2006 prior to the enactment and coming into force of the Employment Act, 2007. To this extent, the applicable law at the time of the claimant's dismissal was the repealed Employment Act, Cap 226. That Act did not have elaborate employee protection regime as the current one. This was the reason for which it was repealed. Provisions such as unfair dismissal and compensation therefore did not exist in that Act but exist in the current Act. The court is however humstrung and cannot import the provisions of the current Act to apply to causes of action that accrued before its enactment since it does not provide for retrospective application.
 12. It is not clear in evidence the extent of the loss if any that the respondent underwent as a result of the alleged credit sale. Besides, other than the allegations in the pleadings, no evidence was produced to show the value of the nuts sold and if they had any connection with the closure of the respondent. Some form financial statements should have been produced. Further it would have been helpful to lead some evidence showing recovery efforts and to what extent they failed. Without this critical pieces of evidence, the court is in the dark as to whether the summary dismissal was warranted. Under the repealed Employment Act which is the applicable law in this case, where the court became of the opinion that an employee was wrongfully dismissed; the court could only reduce that termination to normal termination and award the claimant as per the termination clause in the contract or as per the Act. The claimant's contract of employment dated 29th October, 2005 provides that notice of termination of service must be given in writing and for one month or one month's pay in lieu of notice.
 13. The court therefore awards the claimant Kshs.56,250 on account of wrongful termination of employment. The respondent is further ordered to pay to the claimant all her terminal benefits and accrued leave if not paid already. The respondent is directed to issue the claimant with certificate of service. The decretal sum shall attract interest at court rates.
 14. It is so ordered.

Dated at Nyeri this 6th day of June, 2014.

ABUODHA N. J

JUDGE

Delivered in open Court in the presence of Mr. Kahiga holding brief for Mr. Mungai Advocate for the Claimant and in the absence of the Respondents.

ABUODHA N. J

JUDGE